LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 5 1970

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 805 !

October Term, 1970

• • •

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS
Petitioner

v.

THADDEUS KING, JR.,
Respondent

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

• • •

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Attorneys for Petitioner

P. O. Box 12548, Capitol Station
Austin, Texas 78711

INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	
(1) THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND, FOURTH, FIFTH AND NINTH CIRCUITS	12
(2) THE FEDERAL QUESTIONS HEREIN HAVE NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT	15
CONCLUSION	20
CERTIFICATE OF SERVICE	21

CITATIONS

CASES

Page

Bell v. Alabama, 367 F.2d 243, 247 (5th Cir. 1966) 14

Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) 16

Brewdlove v. Beto, 404 F.2d 1019 (5th Cir. 1968) 13, 14

Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1 (1954) 16

Davis v. Homar, 344 F.2d 84 (6th Cir. 1965) 13

Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756 (1961) 17

Holland v. Boles, 225 F.Supp. 883 (N.D.W. Vir. 1963) 15

Howard v. Beto, 375 F.2d 441, 442 (5th Cir. 1968) (Per Curiam) 14, 15, 20

Hudspeth v. McDonald, 120 F.2d 962 (10th Cir. 1941) 13

Johnson v. Smith, 295 F.Supp. 835 (N.D. Ga. 1968) 13

King v. State, 416 S.W.2d 823 (Tex.Crim.Apps. 1967) 4

Langford v. Alabama, 422 F.2d 760 (1970) (reh.den. en banc) 14

CASES—Con't

Page

Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) 14

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 16, 17

United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2nd Cir. 1967) 13

United States ex rel. Wilkins v. Hannifler, 205 F.Supp. 123 (E.D. Penn. 1962) 15, 20

Weatherman v. Peyton, 287 F.Supp. 819 (W.D. Vir. 1968) 13

Williams v. Beto, 354 F.2d 698 (5th Cir. 1965) 13, 16

Wilson v. Phend, 417 F.2d 1197 (7th Cir. 1969) 13

Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966) 13

CONSTITUTIONS

Constitution of the United States

Sixth Amendment 2, 3, 4, 12, 16, 19

Fourteenth Amendment 2, 3, 4, 12, 13, 15, 20

STATUTES AND RULES

28 U.S.C. §1254(1) 2

Rule 19 §(b) Sup.Ct. Rules 2

IN THE

SUPREME COURT OF THE UNITED STATES

NO. .....

October Term, 1970

• • •

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

Petitioner

v.

THADDEUS KING, JR.,

Respondent

• • •

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

• • •

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 6, 1970.

OPINION BELOW

The opinion delivered in the court below is reported at —— F.2d —— and is appended to this petition as Appendix "A." The opinion of the United States District Court for the Southern District of Texas is reported at —— F.Supp. —— and a copy thereof is appended hereto as Appendix "B." A Stay of Mandate was granted by the United States Court of Appeals to and including October 4, 1970.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on July 6, 1970. (See Appendix "A"). This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and under Rule 19, §(b) Sup.Ct. Rules.

QUESTIONS PRESENTED

Respondent, Thaddeus King, Jr., ex-convict, was represented at his trial by one of three hired counsel. The United States District Court below on habeas corpus, concluded that the quality of the legal services accorded Thaddeus King, Jr., were so poor that he did not have the opportunity to present his side of the story; and therefore, was denied effective assistance of counsel, a fair trial, and due process of law. Under the circumstances, was King deprived of these rights protected by the:

(1) due process clause of the Fourteenth Amendment even though he was not represented by appointed counsel;

(2) due process and equal protection clause of the Fourteenth Amendment where the State of Texas had no actual notice of the inadequacies, misconduct, or lack of preparation of King's own attorneys.

(3) Whether the State of Texas denied King "the Assistance of Counsel for his Defense" that is guaranteed by the Sixth Amendment to the Constitution of the United States where he chose his own counsel to guide him through his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 6:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment 14, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF FACTS

The conviction is for the possession of heroin; the punishment was assessed at sixteen (16) years confinement in the State penitentiary.

On January 12, 1966, Respondent, together with two other persons, was arrested by two City of Houston Police Officers for possessing heroin. On February 25, 1966, an examining trial was conducted in the Justice Court, Precinct No. 1 of Harris County, Texas. Respondent was represented by Rex Emerson, a licensed attorney from Houston, Texas. At that hearing, one of the Houston police officers identified the Respondent as being the person who had thrown out of a speeding car a substance later proved to have been heroin.

On October 10, 1966, Respondent appeared in court, represented by James T. Garrett, also a member of the Houston Bar. A waiver of trial by jury was signed in open court by the Respondent, his counsel and the State's counsel before entering a plea of not guilty. The written consent was also approved by the court and was filed with the papers in the case.

On that same date, Respondent was tried on his plea of not guilty before the court. While testifying, the two Houston police officers identified the Respondent as the driver of an automobile which they were following along a public street, when they saw him throw a small package from the left car window into the street. The package thrown from the car was immediately recovered by one of the officers. A chemical analysis by chemists showed that the substance in the package contained heroin. At the conclusion of testimony, the trial judge found Respondent guilty and assessed his punishment at sixteen (16) years confinement in the Texas Department of Corrections.

An appeal was duly perfected and the judgment of conviction was affirmed by the Court of Criminal Appeals on June 21, 1967, and Respondent's Motion for Rehearing was overruled by the court on July 26, 1967. The opinion of the court is reported in *King v. State*, 416 S.W.2d 823 (Tex.Crim.Apps. 1967).

After pursuing unsuccessfully available state remedies, Respondent filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas.

On August 11, 1969, said court conducted a full evidentiary hearing and at the conclusion of same, held that Respondent had been denied the effective assistance of counsel within the spirit of the Sixth and Fourteenth Amendments to the United States Constitution.

Of course, the proof in such a case as this is not particularly difficult. The proof of the commission of the offense was such that it required very little testimony to prove a prima facie case against the Respondent.

(Transcript of Evidence, pages 124-125). (The testimony adduced at the habeas corpus hearing below, the Transcript of Evidence, will hereinafter be referred to as T.E. ——).

At the habeas corpus hearing below the testimony revealed that Respondent's mother and aunt *retained* Billy C. Powell, an attorney of Harris County, Texas, to represent Respondent on this charge. At the time he was retained to represent Respondent, Powell had two associates in the practice of law, Rex Emerson and James T. Garrett, both former members of the District Attorney's Office and both exceptionally well versed in the field of criminal law.

In the hearing below Respondent testified that somewhere between February 1-15 he met Billy C. Powell, Rex Emerson and a man named Sims on the third floor of the Harris County Jail. (T.E. 29). At that time Respondent "gave him my version of what happened." (T.E. 30). The conversation lasted "from 15 minutes to approximately 30 minutes, maybe, not longer than 30 minutes." (T.E. 30).

Prior to the return of the indictment against Respondent by the Grand Jury, an examining trial had been held in the Justice Court, Precinct No. 1 of Harris County, Texas, in which attorney Rex Emerson had appeared as counsel for Respondent. (T.E. 31).

At the examining trial one of the arresting officers testified that on the 12th day of January, 1966, he and another police officer had received reliable information from a credible source involving narcotics and the automobile in which Respondent was driving. The police officer testified that they observed the automobile

in question and followed said automobile, attempting to stop the automobile. The officers observed the Respondent roll down the window of his automobile, stick his hand out the window and throw something to the ground which was promptly retrieved by one of the officers and which later proved to be heroin. Mr. Emerson conducted a vigorous cross-examination at that hearing and *developed all* of the facts surrounding the actual commission of the offense. At the conclusion of the examining trial, the presiding judge bound the Respondent over to the Grand Jury which subsequently returned the indictment against him.

Respondent was informed by Powell at their first meeting that Emerson would handle the preliminary hearing. (T.E. 30).

Billy C. Powell, one of the attorneys hired to represent Respondent, testified that he was licensed to practice law in the State of Texas since May of 1957 and from January through October of 1960, he served as an Assistant District Attorney in Harris County, Texas. (T.E. 140). At the time of his employment to represent the Respondent Powell had in his employ Rex Emerson and James T. Garrett. (T.E. 142 and 143). Powell and Emerson spent about an hour or an hour and 15 minutes with the Respondent discussing the facts of his case. (T.E. 143). Powell told King "... that Mr. Emerson, Mr. Garrett and I worked together on these cases and we did discuss the facts of the case, the arrest, and whether or not the case, in our opinion, should be retried before a judge or before a jury, and then his background." (T.E. 144). Powell fully explained to Respondent the pros and cons of being tried by a judge instead of a jury and explained to him that

he had a right to be tried by a jury. (T.E. 144). Respondent discussed with Powell his prior criminal record. (T.E. 146). In view of his prior criminal record it was Powell's recommendation that he be tried by a judge instead of a jury. (T.E. 146). Powell emphasized to Respondent that either Mr. Emerson or Mr. Garrett would, in fact, try the case. (T.E. 147). Respondent agreed to this arrangement (T.E. 147). Powell testified that at that meeting the facts of the case were fully discussed in great detail. (T.E. 147-151).

After the examining trial was conducted by Emerson, discussions were held between Emerson, Garrett and Powell. (T.E. 152 & 169).

Rex Emerson testified that he had been practicing law for nearly thirty (30) years (T.E. 208) and that he had been hired by Powell to try criminal cases for him. (T.E. 208). He testified that he had gone to the county jail with Powell specifically to see Mr. King and later conducted the examining trial on February 25, 1966. Prior to the examining trial and after his first meeting with Respondent and Powell, Emerson visited the Respondent in the jail to discuss the facts of the case with him. (T.E. 209 & 210). For the third time and on the date of the examining trial Emerson conferred with Respondent just prior to the examining trial. (T.E. 210).

After the examining trial Emerson returned to his office and conferred with Powell concerning the examining trial. (T.E. 210). Emerson stated that after the examining trial he did discuss the case with Garrett. (T.E. 211).

Garrett testified that he had been licensed to practice since 1956 and had been in the District Attorney's

Office as an Assistant District Attorney for seven (7) years from 1958 through 1964. During that time he had had occasion to try in excess of a thousand cases. (T.E. 221). Garrett officed with Powell and they had a certain business arrangement whereby Garrett would try cases for Powell. In June or July of 1966, Garrett visited Respondent in the Harris County Jail in Houston, Texas. (T.E. 223 and 224). At that meeting with Respondent, Garrett introduced himself and told Respondent that he was associated with Powell. Respondent did not object to being represented by Garrett and discussed the facts of the case with him. (T.E. 224). On the week-end immediately preceding the day of the trial Garrett conferred with Respondent for the last time. (T.E. 225). Garrett recalls that he had seen Respondent on other occasions while Garrett was in the jail conferring with other prisoners. (T.E. 236).

Powell testified that prior to the trial he conferred with Garrett about the case.

On the morning of the trial Garrett conferred with Respondent relative to the trial itself and whether or not a judge or a jury should try the case and whether or not a plea of guilty should be entered. (T.E. 228 & 229).

Garrett testified that the defense of the case was based solely on an attempt to discredit the police officers' testimony by showing that the alleged offense had occurred during a high-speed chase of two automobiles in the nighttime. (T.E. 245, 338).

At this point it becomes necessary to examine the Statement of Facts of the trial itself, to establish whether or not the representation by attorney Garrett

was such as to render the trial a "farce, sham, or mockery of justice."

At the outset, Petitioner directs the attention of the Court to the fact that *Garrett had examined the transcript from the examining trial which summarized the entire case for the prosecution.*

The very first witness to testify in the trial was A. L. Fears, a member of the Narcotics Squad of the Houston Police Department. On January 24, 1966, he and Officer H. M. Gray received information at about 8:00 P.M. that Thaddeus King, Jr., and others, would be riding in a 1949 Dodge, color light blue, License No. MJP-419, 1965 Texas, in the vicinity of the 1000 block of West Dallas and that they would have heroin in their possession. (Statement of Facts, page 3). (The Statement of Facts will hereinafter be referred to as S.F. ——). They immediately drove to the location and noticed the described car heading east on West Dallas and began pursuit. The automobile fit the description given by the informer and had the exact same license number. Officer Fears testified that he observed the driver, "who was King, roll his window down and drop a small silver package from the window. At this time Officer Gray slowed the car down enough for me to get out of the car. I got out of the car and went around and picked up the package King had thrown out the window." (S.F. 5). The car was stopped immediately thereafter and Respondent and the passengers got out of their car and Officer Gray picked up another silver package from inside the automobile. (S.F. 6). Officer Fears testified that "I could see the windows were all up and as we were pulling alongside it with our lights shining we noticed the window go part of the way

down. It didn't go all the way down, and at this time I could see him extending his arm and drop the package to the ground." (S.F. 6). The officer testified that he knew Thaddeus King, Jr., prior to that night and did recognize him before he stopped the automobile. (S.F. 11).

Attorney Garrett then took Officer Fears on cross-examination and conducted a vigorous and thorough cross-examintion with more than ordinary resourcefulness attempting every possible way to discredit the officer. The cross-examination conducted by Garrett covers some fifteen (15) pages of testimony while the direct examination appears on only ten (10) pages of direct testimony.

The State then offered the testimony of a chemist who testified that the substance of the package contained heroin and rested.

The defense first called James Edward Mathis who testified that he was in the automobile together with King and another person on the night that they were arrested. He testified that he did not see any narcotic drugs coming out of the automobile while he was in the company of Respondent. (S.F. 34). On cross-examination Mathis testified that he had been previously convicted of a felony.

Respondent King took the stand and testified that the automobile was not his and that he had borrowed the car to look for a job on the day of the arrest. That while being followed by the police officers he had no idea it was police officers. He testified that he had not attempted to get away from the car following him because he had not violated any laws. (S.F. 39). Re-

spondent stated that while driving both of his passengers to their homes he attempted to make a turn and had to signal with his arm because the automobile had no turn signals. (S.F. 40). He then denied having thrown the package of heroin out of the car window. On cross-examination Respondent stated that he had had one conviction for possession of marijuana. (S.F. 41). He denied that the police officers ever pulled up beside him while he was driving the automobile (S.F. 42) and testified that the window of his automobile was down. He further testified that he had held his hand out of the window to make turn signals at least three times. (S.F. 43).

Arthur Lewis Walton was then called by the defense and testified that he was also in the company of the Respondent and James Edward Mathis on the night of the arrest and he did not see any heroin come in or go out of the automobile at any time. (S.F. 46). On cross-examination it was brought out that the witness had plead guilty in the adjoining courtroom and had admitted possession of the narcotics. He stated that "I just pleaded guilty to get it over with. I didn't want to face a jury. I had a prior conviction I was convicted in." (S.F. 48). He also admitted having been convicted of robbery by assault and of a misdemeanor involving moral turpitude. (S.F. 49). He denied that he had seen Respondent throw the package of narcotics out of the car window.

On rebuttal the State called Officer H. M. Gray, a member of the Houston Police Department, who was in the company of A. F. Fears on the night of the arrest. He corroborated the testimony of Officer Fears and testified in detail concerning the blue 1949 Dodge

automobile, License No. JMP-419, the location and time as related to them by the informer. He testified that he had known Respondent about twenty-five or thirty years (S.F. 53) and that he had recognized him as being the driver of the automobile.

Garrett then conducted a thorough and skillful cross-examination of Officer Gray attempting to discredit his testimony by showing that it was dark, that the automobiles were speeding and that it was impossible to see the Respondent driving the automobile. (S.F. 55, 56 & 57). After the cross-examination of this witness the State and the defense both rested and closed.

The court below in granting the Writ of Habeas Corpus concluded that it would grant the writ because ". . . the quality of the legal services accorded Petitioner were so poor that he did not have the opportunity to present his side of the story. He was, therefore, denied effective assistance of counsel, a fair trial, due process of law, . . ."

The United States Court of Appeals for the Fifth Circuit affirmed the United States District Court below and held that the Respondent had been denied effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution. The court held that the Respondent's attorney at his trial was not "counsel reasonably likely to render and rendering reasonably effective assistance."

REASONS FOR GRANTING THE WRIT

(1) THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED

STATES COURT OF APPEALS FOR THE SECOND, FOURTH, FIFTH AND NINTH CIRCUITS.

The courts are divided on whether or not a distinction between retained counsel and appointed counsel is controlling in considering cases dealing with the adequacy-of-counsel. The majority decisions have drawn no distinction between retained counsel and appointed counsel in considering the adequacy of counsel question. See *Breedlove v. Beto*, 404 F.2d 1019 (5th Cir. 1968) at 1020 n.1; *United States ex rel. Maselli v. Reincke*, 383 F.2d 129 (2nd Cir. 1967); *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969); *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966).

Other decisions, differentiating between appointed and retained counsel, have denied the ineffective assistance-of-counsel contention on the grounds that unless state officials outwardly prevent privately retained counsel from performing his duties, there is no state action and thus no denial of Fourteenth Amendment rights. See *Davis v. Bomar*, 344 F.2d 84 (6th Cir. 1965); *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir. 1941); *Johnson v. Smith*, 295 F.Supp. 835 (N.D. Ga. 1968); *Weatherman v. Peyton*, 287 F.Supp. 819 (W.D. Vir. 1968).

The Fifth Circuit Court of Appeals' standard for whether there was unconstitutionally ineffective counsel is apparently established in *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). However, there is a conflict in the United States Court of Appeals for the Fifth Circuit on its position on the issue of whether the inquiry is limited to court-appointed counsel. This un-

certainty arises because of conflicting decisions by that court. In *Howard v. Beto*, 375 F.2d 441, 442 (5th Cir. 1968) (per curiam), the court stated in effect that an ineffective retained counsel's actions could not be imputed to the State. However, in *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966), Judge Tuttle, commenting on the effective assistance-of-counsel test stated:

> "It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant."

Furthermore, in *Porter v. United States*, 298 F.2d 461, 463 (5th Cir. 1962), Judge Brown stated:

> "The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court appointed."

In *Howard v. Beto*, supra, one panel of judges held that "there is, of course, a distinction to be made between the lack of effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the latter that opens the judgment to challenge by habeas corpus. Here the attorney's alleged incompetence cannot be imputed to the State." In *Breedlove v. Beto*, supra, another panel from the same circuit, in dictum, discussed the contention that defendant's retained counsel was so ineffective as to amount to an unconstitutional denial of counsel.

In its latest pronouncement the United States Court of Appeals for the Fifth Circuit in *Langford v. Alabama*, 422 F.2d 760 (1970) (reh.den. en banc) at page 763 rejected the dictum in *Breedlove* and adhered to

the holding in *Howard*. However, according to the opinion of the court below, the position taken by the court on the issue of whether the inquiry is limited to court-appointed counsel seems to be still in a state of fluctuation.

In rejecting claims of inadequate legal representation in state criminal proceedings, some cases hold that the Fourteenth Amendment only prescribes state activity and have maintained that without notice of the defense lawyer's inadequacies or misconduct, the State has not deprived the defendant of due process. See *United States ex rel. Wilkins v. Banmiller*, 205 F.Supp. 123 (E.D. Penn. 1962); *Holland v. Boles*, 225 F.Supp. 863 (N.D.W. Vir. 1963). Aside from the "state action" theory, when counsel is retained by the defendant, the tendency of many courts has been to lower the standard of "effective assistance" to which he is held. The rationale being that inasmuch as the defendant has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than must the indigent for his appointed counsel.

For this reason it is submitted that this case presents a question of public importance which merits plenary review by this court.

(2) THE FEDERAL QUESTIONS HEREIN HAVE NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT.

The basic question in this case would not seem to have ever come before this court. Prior cases before this court which come closest to presenting a question

similar to that in this case would seem to be *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). The cases, however, do not directly touch upon the question of what constitutes the effective assistance of counsel.

The State of Texas urges that the pertinent test to be applied in a case where the competency of counsel is at issue is whether the representation of counsel was such that it rendered the trial a farce, a sham or mockery of justice. This standard was established in the United States Court of Appeals for the Fifth Circuit in *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965).

The court below completely ignored the manner in which James T. Garrett conducted the defense of Respondent's trial. Petitioner has elaborated at length and summarized the entire Statement of Facts to show the court that the trial was fairly conducted and that Respondent was not denied any of the procedural protections which are his by right under the federal Constitution. The Sixth Amendment right to counsel was not denied him. After everything has been said and done, Respondent is faced with the inescapable conclusion that: (1) he did not have court-appointed counsel, (2) he did retain counsel, (3) he was not a pauper, and (4) he chose his own counsel.

In *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252 (1942), the Supreme Court made it clear that denying a defendant the assistance of his own lawyer in any case constituted a per se violation of "fundamental fairness." In *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, (1954), the Supreme Court stamped the right of Pe-

titioner "to be heard through his own counsel" as "unqualified." Recalling the words of Justice Sutherland in *Powell v. Alabama*, supra:

> "Even the intelligent and uneducated layman has small and sometimes no skill in the science of law . . . He requires the guiding hand of counsel at every step in the proceedings against him."

The later case of *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, (1961) held, in effect, that a state may not deny a criminal defendant the right to have his own counsel guide him on direct examination.

All three attorneys, Powell, Emerson, and Garrett, stated that Respondent had been informed and had agreed to an "office arrangement" among the three attorneys whereby they would all work together on the case and share in the distribution of profits. Garrett also stated that he had visited with Respondent in June or July before the trial and had discussed the case with him. This was of course denied by the Respondent who testified as follows:

"Q Now, did you ever tell Mr. Garrett that you did not want him to represent you?

"A I had never, until Mr. Garrett sent for me out of the hold-over tank, known that he was supposed to represent me, until the judge walked in the door.

"Q *My question to you was: Did you tell Mr. Garrett, 'No, I do not want you to represent me, I want Mr. Powell to represent me?'*

"A *No, I didn't tell him direct.*

"Q Well, indirectly did you tell him?

"A Well, I asked how could he represent me?

"Q What did he say to that?

"A He said I had nothing to worry about.

"Q Did you ever tell the Judge that your lawyer was not present in the courtroom?

"A No, I didn't have—well, I didn't have time; as I said before, I didn't have nowhere to stand up and shout or stop the trial, I didn't know what procedure to do to stop the trial.

"Q So you went along?

"A He kept coaxing me along, making me assume everything was all right.

"Q *Will you please explain to the Court here why when you testified—you were on the stand testifying in your behalf—you didn't tell the Court that he was not your lawyer?*

"A My trial was—once again, I didn't want to come in contempt of Court.

"Q You thought that would put you in contempt of Court.

"A I didn't know the statutes, under contempt.

"Q And you were afraid to speak up?

"A Indirectly, I was afraid, yes, sir.

"Q You weren't familiar with courtroom procedure very much?" (T.E. 57-59).

Assistant District Attorney Frank Puckett, Jr., who prosecuted Respondent at the original trial testified to the following:

"THE COURT: Judge Walton appointed Garrett to represent him, I guess. I don't know whether that occurred or not, unless the Defendant was telling a complete untruth, how he could be so confused.

"THE WITNESS: I have my own impression of it. I thought —

"THE COURT: You thought Garrett was the employee?

"THE WITNESS: Yes.

"THE COURT: Because the record doesn't reflect an appointment.

"THE WITNESS: I'm almost certain Mr. Garrett was employed." (T.E. 98-99).

Respondent was no stranger to courtroom procedures and was not without previous criminal experience. He had stood before the bar on numerous occasions. (S.F. 41 and T.E. 51-56). One of Respondent's prior convictions was for possession of marijuana. (S.F. 41 & 42). There was no specific finding by the United States District Court below on this issue. However, the Court stated that "at the trial, Petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office."

The State of Texas did not deny Respondent the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution. To honor Respondent's claim is to implicitly censure the trial court, as the United States District Court below is saying, in effect, that the trial court was blind to injustice committed in its presence. To readily honor the claim would force the trial judge to intervene whenever possible error is being committed by the defense attorney; and would permit a lawyer with a desperate case to insure his client a new trial by deliberately committing

error. The Fourteenth Amendment only proscribes state activity, and without *actual notice* of the defense lawyer's inadequacies, misconduct, or lack of preparation, the State has not deprived the defendant of due process. See *Howard v. Beto*, supra and *United States ex rel. Wilkins v. Bannmiller*, supra.

In this situation, it is fair to say that Respondent is presumed to have acquiesced in all of his lawyer's activities unless he notified the court to the contrary. In view of the fact that Respondent has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than the indigent defendant for his appointed counsel.

If the trial court must guide and steer the course of a man's defense, then a lawyer's freedom of choice in realms heretofore thought to be within the counsel's judgment (such as trial tactics and defensive strategy) has been dealt a death blow. Moreover, a matter of more critical importance would be, under any other rule, the inescapable demise of the adversary system.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Attorneys for Petitioner
P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Respondent's attorney by depositing same in the United States Mail, postage prepaid, First Class, to Mr. Marvin O. Teague, Attorney at Law, 400 State National Building, 412 Main Street, Houston, Texas 77002 this the ____ day of _____, 1970.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28696

THADDEUS KING, JR.,

Petitioner-Appellee.

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

(July 6, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: This is an appeal by the State of Texas from a state prisoner's application for writ of habeas corpus granted by the District Court, Southern

District of Texas, on the grounds that the petitioner was denied effective assistance of counsel at his trial. We affirm.'

Thaddeus King, Jr., (hereinafter petitioner) was arrested on the night of January 24, 1966, for possession of heroin. Shortly thereafter, petitioner's aunt contacted an attorney (hereinafter First Attorney) to represent petitioner, and a fee was agreed upon and paid by her. In early February, First Attorney and an assistant (hereinafter Second Attorney) visited with the petitioner at the county jail and discussed his case with him for approximately twenty minutes.' On February 25th, an examining trial was held, at the conclusion of which petitioner was bound over to the grand jury. At this trial, petitioner was represented by Second Attorney. Other than these two contacts with lawyers, the petitioner was left in the dark as to the progress of his case until the day of his trial over seven months later.

On the day of the trial, petitioner was contacted in the "holdover tank" in the courthouse by a third lawyer (hereinafter Third Attorney) and told by the lat-

---

'Each case involving the constitutional issue of effectiveness of counsel depends on the facts—the specific conduct of the parties involved. See, e.g., *Roberts v. Dutton*, 5 Cir. 1966, 368 F.2d 465; *Williams v. Beto*, 5 Cir. 1965, 354 F.2d 698; *MacKenna v. Ellis*, 5 Cir. 1960, 280 F.2d 592. In assessing what the true facts are, the District Court is allowed much discretion as to the credibility of the witnesses testifying at the habeas corpus hearing under Rule 52(a), F.R.C.P. The District Court here, through its Findings of Facts, has chosen to discredit much of the testimony of the state's witnesses and to accept much of that of petitioner's witnesses. Such decision is supported by the record in this case as is the following version of the facts.

'Both First and Second Attorney testified that the interview lasted one to one and a quarter hours.

ter that he would represent him at his trial. Petitioner testified that he did not know Third Attorney, had never talked to him, nor had he even heard his name mentioned.*

As to what then transpired, petitioner testified as follows:

> A. I encountered [sic] [Third Attorney] as to [First Attorney's] whereabouts. I asked him if he would see [First Attorney] and please tell him I am up here, and I don't know if he notified him or anyone. I told him I would like to see him right away. And he said, "What are you all going to do, are you going to pick a jury, too?"
>
> And I said, "No, I don't think we will pick a jury, I will go before the Judge."
>
> * * * *
>
> Q. Then what happened?
>
> A. He walked away, and about ten minutes later a bailiff came and said, "King."
>
> And I said, "Yes."
>
> And he said, "Come on," he said, "with me," and opened the door and I went with him, and on the way I asked him, "Has the trial started already?" I was thinking I was going to be a witness in Walton's (a co-defendant being tried

*All three attorneys stated that petitioner had been informed of an "office arrangement" among the three attorneys whereby Third Attorney shared office space with First Attorney and the two worked together on criminal cases often with a specified distribution of the profits. Third Attorney also stated that he had visited with petitioner in June or July before the trial. However, this testimony was not substantiated, was denied by petitioner and was excluded from the District Court's Findings of Facts.

separately) case. And he said, "No, your lawyer wants to talk to you," he say, and I was wondering why he hadn't come to the jail.

And I said, "Okay."

I went to this courtroom and he opened the door and [Third Attorney] was sitting at the table and the court reporter, I imagine, just two other people were in the courtroom, and I said, "I don't see my lawyer."

And so [Third Attorney] said, "Come here." And he called me over. And, again, I asked [Third Attorney] I said, "Did you see [First Attorney]?"

And he said, "Oh, he will be along after awhile."

And I sat down, and he said, "Is this"—he handed me my preliminary record (transcript of examining trial) here and asked me "Is this what happened at your preliminary trial?"

And I began reading and [Third Attorney] let me read it. He didn't say anything else about representing me or whether he was going to represent me or not. So I began reading, and I say, "Yes, this is about what happened."

"You are not going to get a jury?"

And I said, "No, [Third Attorney]."

At approximately this time the door opened to my left and the Judge was walking in. They were saying "Everybody stand up." So I looked around to see who was going to be tried, and at this point [Third Attorney] said, "The Judge appointed me to represent you."

And, again, I said, "Why didn't [First Attorney] show?"

And he said, "That's all right." Said, "You waive the jury." And I signed a waiver of the jury, and I kept mumbling between [Third Attorney] and myself, and the Judge got seated and said, "Be quiet."

And I looked around again to see if [First Attorney] was coming, and no [First Attorney].

So, he got his legal pad out after he had told me the Judge appointed him, and I didn't know whether I would be out of order to just ask him, or what have you, or stop the trial. I wasn't familiar here. And he turned over to the legal pad and marked on a piece of paper and asked me what happened.

And I say, "[Third Attorney], you can't defend me, you don't know anything about my case."

And he said, "Don't worry about it." And this is how my trial began, Lawyer Teague.

Q. Prior to this time had you and [Third Attorney] had any discussion whatsoever about your case?

A. I had never said anything to [Third Attorney] about my case prior to this.[4]

The trial itself lasted one hour and thirty-five minutes. The petitioner's signing of the waiver of jury

[4]Third Attorney testified that he had seen petitioner on other occasions and on the weekend before the trial but only as he was, in his own words, "passing through the jail corridors themselves, and he would talk to me at the peep-hole window there when other prisoners were lined up to discuss their particular cases with me". There was testimony from Third Attorney that he had read the transcript of the examining trial, but there was no evidence of extensive briefing of Third Attorney by Second Attorney.

form appears from the evidence to have been an informed and intelligent waiver as the consequences of his choice had been previously explained to him by First and Second Attorneys. There does not appear to have been extensive discussion between Third Attorney and petitioner on the plea that should be entered, petitioner insisting he was not guilty. Nor was there any credible evidence that Third Attorney had engaged in plea bargaining with the District Attorney.

When the state offered into evidence the tinfoil of heroin, without which the state would admittedly have not had a case against petitioner, there was no objection made, nor any motion to suppress, even though the heroin was allegedly thrown from a car in which three people were riding and later picked up on the street by a police officer. There was no fingerprint evidence introduced by the state nor any other evidence introduced that would have connected the heroin to the petitioner.

As far as additional evidence which Third Attorney could have brought forth on petitioner's behalf, there were at least two other witnesses whose testimony may or may not have been favorable to petitioner. Third Attorney did not investigate or interview either of these witnesses.

Also at the trial Third Attorney specifically asked petitioner about past convictions to which petitioner responded he had been convicted fourteen years ago. While the answer was not responsive, the question was unnecessary and is indicative of lack of counselling with petitioner.

At the end of the trial, petitioner was sentenced to sixteen years. No effort was made to obtain a new trial

or to appeal. Petitioner testified that before he was even aware that he was being tried, he was back in his jail cell without ever having had the opportunity to tell his side of the story.

The District Court, examining Third Attorney's file on petitioner's case, discovered therein only a single sheet of paper which was blank except for the notation, "Defendant, Thaddeus King, fee, $300.00" and the date "10-9-66 — Closed" followed by Third Attorney's initials.*

The generally accepted standard by which to determine whether a defendant has been denied effective assistance of counsel has been set out in *Brown v. Beto,* 5 Cir., 1967, 377 F.2d 950, 957-958:

> "The actual standard of incompetency applied by the overwhelming majority of courts is stated as follows: Incompetency of counsel such as a denial of due process and effective representation of counsel must be such as to make the trial a farce, sham, or a mockery of justice." [Citation omitted.] This court has defined "effective counsel" in terms of a "reasonable counsel" standard: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis,* 5 Cir., 1960, 280 F.2d 592.

See also *Odom v. United States,* 5 Cir., 1967, 377 F.2d 853.

The cumulative effect of the above facts, as so found by the District Court and supported by the record,

*Third Attorney testified that his notes had been lost.

is that the petitioner was denied effective assistance of counsel guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution. All of the above facts, taken together, demonstrate that the petitioner's attorney at his trial was not "counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna,* supra, at 599.

We conclude that the District Court, by measuring the above facts against this legal standard, was not clearly erroneous in its finding that "the legal services accorded petitioner were so poor that he did not have the opportunity to present his side of the story . . . [and] was, therefore, denied effective assistance of counsel, a fair trial, due process of law, and is entitled to habeas corpus." The Court's order that petitioner be discharged from the custody of the state without prejudice to the state to retry petitioner upon indictment is therefore

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. 67-H-901

THADDEUS KING,

Petitioner

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent

Memorandum and Order

This is an application for habeas corpus filed by petitioner, Thaddeus King, seeking relief under 28 U.S.C. §§2241 *et seq.*

On October 10, 1966, petitioner was convicted in Criminal District Court No. 4, Harris County, Texas, on a charge of unlawful possession of heroin. The Texas Court of Criminal Appeals affirmed on June 21, 1967. *King v. State,* 416 S.W.2d 823 (Tex. Cr. App. 1967). Petitioner's motion for rehearing was thereafter denied on July 26, 1967.

After that, petitioner applied for habeas corpus in the convicting court where he was denied permission to file. Again, the Texas Court of Criminal Appeals denied him relief. As respondent has admitted, petitioner has exhausted his available remedies in the courts of the State of Texas. The requirements set forth in *Texas v. Payton,* 390 F.2d 261 (5th Cir. 1968), have been satisfied.

Petitioner's sole contention is that he did not have the effective assistance of counsel within the spirit of the Sixth and Fourteenth Amendments to the United States Constitution.

Since the time of the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it has not been doubted that each person accused of a crime, regardless of his ability to pay the costs, must have an attorney to represent him at trial if he wants one. By "assistance of counsel" the Sixth Amendment does not mean any assistance will do, but that there must be effective assistance. *Powell v. Alabama*, 287 U.S. 45 (1932); *Avery v. Alabama*, 308 U.S. 444 (1940). See also *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967). In the latter case, effective assistance was defined in the following terms:

> "'. . . Incompetency of counsel such as a denial of due process and effective representation by counsel must be such as to make the trial a farce, sham, or mockery of justice.' This Court has defined 'effective counsel' in terms of a 'reasonable counsel' standard: 'We interpret the right of counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" 377 F.2d 958.

As was said in *Williams v. Beto*, 354 F.2d 698, 705 (5th Cir. 1965), "Lawyers are not required to be infallible. If they were, law practice would soon disappear. . . ."

If, then, the Sixth Amendment does not require that criminal defendants have a perfect attorney, what does it require? The answer is that counsel must undertake to do those things necessary to the best interests of his

client. As a bare minimum, this includes sufficient consultation with the accused to bring about an understanding of the case, advice to the accused of his constitutional rights, particularly his constitutional right to a trial by jury, and at trial a probing examination and cross-examination of witnesses, reasonable attempts to obtain and offer any defensive evidence, and if at all possible sufficient objections to the introduction of the evidence by the state so that the trial judge can have an opporunity to clearly understand the legal problems involved before making a ruling, and the presentation of some oral arguments on behalf of the accused. See *Williams v. Beto*, supra, citing *Collingsworth v. Mayo*, 173 F.2d 695 (5th Cir. 1949).

Unquestionably, these standards apply to attorneys which have been assigned to represent indigents. Whether they are applicable where the accused has retained counsel is another matter. At least one case in the Fifth Circuit has held that there is a distinction between lack of effective counsel and being denied the right to effective counsel. *Howard v. Beto*, 375 F.2d 442 (5th Cir. 1967). There has, however, been an indication in another Fifth Circuit case that the same considerations govern regardless of whether the attorney is appointed or retained. See *Williams v. Beto, supra*, at p. 700, citing *Williams v. United States*, 345 F.2d 733 (C.A.D.C. 1965), wherein Judge Burger, now the Chief Justice of the Supreme Court, said:

> "We have no more right to ask volunteer lawyers to stultify themselves or prostitute their professional standards than we would have to demand that paid lawyers do so."

Here, petitioner was arrested on January 24, 1966,

almost nine months before his trial. In the early part of February, petitioner's aunt, Ola Jones, contacted an attorney to represent petitioner in the matters pending against him. A fee was agreed upon and paid. Thereafter, this attorney, together with an associate, went to the Harris County Jail and talked to petitioner. At the examining trial the associate appeared on behalf of petitioner. Other than the first visit and the examining trial, neither the employed attorney nor his associate ever contacted petitioner again prior to his trial. At the trial, petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office. This attorney (the one appearing on behalf of petitioner at the trial) had a casual look at petitioner while petitioner was in jail, but no contact was had with petitioner and this attorney never visited with petitioner while petitioner was in jail. The one and only time this "trial attorney" ever conferred with petitioner was on the day of trial. That conference lasted something less than thirty minutes.

Petitioner's trial began at 1:40 P. M. and ended the same afternoon at 3:15 P. M. When the state offered into evidence the heroin, no objection was made, although the heroin introduced into evidence was heroin allegedly thrown from a car and picked up on the street. Apparently, no fingerprints were made of the package containing the heroin to determine whether petitioner actually handled it. Petitioner claimed to have had certain witnesses he wanted to call on his behalf, but the "trial attorney" refused to call them. At

the habeas hearing the "trial attorney" testified he did not see any reason to put these witnesses on the stand even though he never talked to them. The only evidence the "trial attorney" offered on the point of whether or not in his opinion he rendered effective assistance of counsel was his expressed opinion that he did everything petitioner wanted him to do. This Court concludes that the "trial attorney" actually wanted petitioner to plead guilty but petitioner refused, expressing his innocence at that time. At the conclusion of the trial petitioner was sentenced to 16 years, even though from the time of his arrest to the present, he strongly insisted upon his innocence.

The employed attorney's file consisted of a manila folder with petitioner's name on it. Inside the folder was a single sheet of paper which was blank except for the following: "Defendant, Thaddeus King, fee, $300.00." The only other notation on the file was the notation "10-9-66, Closed" which was initialed by the "trial attorney." The record is absolutely bare of any evidence of any work actually done in connection with petitioner's case.

It must be concluded that the quality of the legal services accorded petitioner were so poor that he did not have the opportunity to present his side of the story. He was, therefore, denied effective assistance of counsel, a fair trial, due process of law, and is entitled to habeas corpus.

For the above reasons, the petition for the writ of habeas corpus will be granted and petitioner discharged from the custody of the respondent without prejudice to the state to retry petitioner upon the indictment within ninety days from this date.

This Memorandum and Order will constitute a findings of fact and conclusions of law of this Court.

The Clerk is directed to file this Memorandum and Order and send copies to the attorneys of record.

DONE at Houston, Texas this 6th day of November, 1969.

JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28696

D. C. Docket No. CA 67-H-901

THADDEUS KING, JR.,
Petitioner-Appellee,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that respondent-appellant pay to petitioner-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 6, 1970

Issued As Mandate:

INDEX

	Page
Introduction	1
Lower Courts' Rulings	1
Facts of Cause	2
Statement of the Respondent Regarding Conflicts of the Circuits and Fact Question Presented Has Not Heretofore Been Specifically Decided By This Court	2
Questions Presented and Response Thereto	3
Conclusion	70
Certificate of Service	70

CITATIONS

CASES	Page
UNITED STATES SUPREME COURT	
Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493	9
Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377	9, 11
Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595	9
Brookhart v. Janis, 86 S.Ct. 1245, 384 U.S. 1, 16 L.Ed.2d 314	28
Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814	9
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799	9, 62
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680	9
Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891	9

CASES	Page
Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61	10
Henry v. Mississippi, 85 S.Ct. 564, 379 U.S. 443 13 L.Ed.2d 408	28, 62
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461	9
Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1926, 18 L.Ed.2d 246	22
Michel v. Louisiana, 76 S.Ct. 158, 350 U.S. 91, 100 L.Ed. 83	11
Norvell v. Illinois, 373 U.S. 420, 83 S.Ct. 1366, 10 L.Ed.2d 456	41
Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923	9
Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, 53 S.Ct. 55	6, 8, 10
Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77	9
Shelley v. Kramer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161	16
Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859	9
Wade v. United States, 386 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149	22
White v. Ragen, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348	10
UNITED STATES DISTRICT COLUMBIA	
Bruce v. United States, D.C. Cir., 379 F.2d 113	43
Harried v. United States, D.C. Cir., 389 F.2d 281	33
Harrison v. United States, D.C. Cir., 387 F.2d 203, see also 359 F.2d 214	38
Haziel v. United States, D.C. Cir., 404 F.2d 1275	28
Heard v. United States, D.C. Cir., 419 F.2d 682, see also 348 F.2d 43; 390 F.2d 866; 263 F. Supp. 613	22
Holmes v. United States, D.C. Cir., 370 F.2d 209	52
Scott v. United States, D.C. Cir., 427 F.2d 609	17

CASES	Page
Spriggs v. Wilson, D.C. Cir., 419 F.2d 831	21
United States v. Hammonds, D.C. Cir., 425 F.2d 597	18
FIRST CIRCUIT	
Goitia v. United States, First Circuit, 409 F.2d 524, cert. denied, 397 U.S. 906	28
Lamoreux v. Massachusetts, First Circuit, 412 F.2d 710	27
Marxuach v. United States, First Circuit, 398 F.2d 548, cert. denied, 393 U.S. 982	30
SECOND CIRCUIT	
United States v. Follette, Second Circuit, 358 F.2d 922	59
United States v. Garguilo, Second Circuit, 324 F.2d 795	62
United States v. Katz, Second Circuit, 425 F.2d 929	18
United States v. Lovano, Second Circuit, 420 F.2d 769, cert. denied, 397 U.S. 1071	19, 21
United States v. Reinecke, Second Circuit, 383 F.2d 129	39
United States v. Phillips, Second Circuit, 426 F.2d 1069	18
United States v. Wilkins, Second Circuit, 351 F.2d 892, cert. denied, 383 U.S. 916, 383 U.S. 963	62
THIRD CIRCUIT	
Cannon v. Maroney, Third Circuit, 373 F.2d 908, cert. denied, 352 U.S. 898, 1 L.Ed.2d 90, 77 S.Ct. 139	51
United States v. Rundle, Third Circuit, 394 F.2d 748	27
Walker v. United States, Third Circuit, 422 F. 375	19

CASES — Page

FOURTH CIRCUIT

Braxton v. Peyton, Fourth Circuit, 365 F.2d 563, Cert. Denied, 385 U.S. 939 57
Coles v. Peyton, Fourth Circuit, 389 F.2d 224, Cert. Denied, 393 U.S. 849 33
Fields v. Peyton, Fourth Circuit, 375 F.2d 624 49
Horne v. Peyton, Fourth Circuit, 356 F.2d 631, Cert. Denied, 385 U.S. 863 61
Ingram v. Peyton, Fourth Circuit, 367 F.2d 933 55
Kelly v. Peyton, Fourth Circuit, 420 F.2d 912 21
Martin v. Virginia, Fourth Circuit, 365 F.2d 549 56
Osborne v. United States, Fourth Circuit, 371 F.2d 912 26
Owsley v. Peyton, Fourth Circuit, 368 F.2d 1002 54
Rambo v. Peyton, Fourth Circuit, 380 F.2d 363 42
Root v. Cunningham, Fourth Circuit, 344 F.2d 1, Cert. Denied, 382 U.S. 866 64
Stem v. Turner, Fourth Circuit, 370 F.2d 895 52
Stevens v. Maryland, Fourth Circuit, 382 F.2d 429 41
Sykes v. Virginia, Fourth Circuit, 364 F.2d 314 58
United States v. Cook, Fourth Circuit, 400 F.2d 877 Cert. Denied, 393 U.S. 1100 30
United States v. Pearce, Fourth Circuit, 412 F.2d 1192 27
Whittaker v. Maryland, Fourth Circuit, 362 F.2d 838 59

FIFTH CIRCUIT

Baker v. Wainwright, Fifth Circuit, 422 F.2d 145, Cert. Denied, 399 U.S. 927 19
Bell v. Alabama, Fifth Circuit, 367 F.2d 243, Cert. Denied, 386 U.S. 916 54
Beto v. King, Fifth Circuit, 429 F.2d 221 1
Bostick v. United States, Fifth Circuit, 400 F.2d 449, Cert. Denied, 89 S.Ct. 725, 393 U.S. 1068 29

CASES	Page
Breedlove v. Beto, Fifth Circuit, 404 F.2d 1019	15, 67
Brooks v. Texas, Fifth Circuit, 381 F.2d 619	42
Bursten v. United States, Fifth Circuit, 395 F.2d 976, see also 3 A.L.R.F. 644	38
Busby v. Holman, Fifth Circuit, 356 F.2d 75	59
Calloway v. Powells, Fifth Circuit, 393 F.2d 886	31
Campbell v. United States, Fifth Circuit, 401 F.2d 894	29
Caraway v. Beto, Fifth Circuit, 421 F.2d 636	20
Cohen v. Wainwright, Fifth Circuit, 418 F.2d 565, Cert. Denied, 399 U.S. 933	23
Cowens v. Wainwright, Fifth Circuit, 373 F.2d 34, Cert. Denied, 387 U.S. 913	51
Dougherty v. Beto, Fifth Circuit, 388 F.2d 810	37
Doughty v. Beto, Fifth Circuit, 396 F.2d 128	37
Fitts v. United States, Fifth Circuit, 406 F.2d 518	18
Fortner v. Balkcom, Fifth Circuit, 380 F.2d 816	42
Foster v. Beto, Fifth Circuit, 412 F.2d 1079	27
Greer v. Beto, Fifth Circuit, 379 F.2d 923	46
Harris v. Deeves, Fifth Circuit, 412 F.2d 892	20
Harrison v. United States, Fifth Circuit, 387 F.2d 614	38
Henderson v. United States, Fifth Circuit, 419 F.2d 1277	22
Hintz v. Beto, Fifth Circuit, 379 F.2d 937	43
Hollingshead v. Wainwright, Fifth Circuit, 423 F.2d 1059, Reversed, Per Curiam, 384 U.S. 31, 16 L.Ed.2d 333, 86 S.Ct. 1284	19
Hollis v. Beto, Fifth Circuit, 352 F.2d 550, Cert. Denied, 382 U.S. 1020; 20 A.L.R. 2d 1240	62
King v. Wainwright, Fifth Circuit, 368 F.2d 57, Cert. Denied, 389 U.S. 995	53
Lamb v. Beto, Fifth Circuit, 423 F.2d 85	19
McCollum v. Bush, Fifth Circuit, 344 F.2d 672, Cert. Denied, 382 U.S. 883	66

CASES	Page
McKissick v. United States, Fifth Circuit, 379 F.2d 754	43
Mosley v. Dutton, Fifth Circuit, 367 F.2d 913, cert. denied, 387 U.S. 942	56
Odom v. United States, Fifth Circuit, 377 F.2d 853	47
Pineda and Bailey v. Beto, Fifth Circuit, 340 F.2d 162	63
Quarrels v. Dutton, Fifth Circuit, 379 F.2d 934	47
Randazzo v. United States, Fifth Circuit, 339 F.2d 79	64
Roberts v. Dutton, Fifth Circuit, 368 F.2d 465	53
United States v. Grimes, Fifth Circuit, 426 F.2d 706	18
United States v. Johnson, Fifth Circuit, 417 F.2d 332	23, 25
United States v. Long, Fifth Circuit, 419 F.2d 91	21
United States v. Mancuso, Fifth Circuit, 423 F. 2d 23	19
United States v. Valdez, Fifth Circuit, 418 F.2d 363	22
White v. United States, Fifth Circuit, 396 F.2d 282	19
White v. Beto, Fifth Circuit, 399 F.2d 302	30
Williams v. Beto, Fifth Circuit, 354 F.2d 698	28
Windom v. Cook, Fifth Circuit, 423 F.2d 721	19
SIXTH CIRCUIT	
Henderson v. Cordwell, Sixth Circuit, 426 F.2d 150	15, 18
Morton v. Henderson, Sixth Circuit, 389 F.2d 699	33, 42
Schaber v. Maxwell, Sixth Circuit, 348 F.2d 664, cert. denied, 371 U.S. 853, 9 L.Ed.2d 88, 83 S.Ct. 53, 371 U.S. 899, 9 L.Ed.2d 132, 83 S.Ct. 191	63
Stack v. Bomar, Sixth Circuit, 354 F.2d 200	62

CASES

	Page
Townsend v. Bomar, Sixth Circuit, 351 F.2d 499	63
United States v. Cale, Sixth Circuit, 419 F.2d 897	19
United States v. Medlin, Sixth Circuit, 353 F.2d 789, cert. denied, 384 U.S. 973, 385 U.S. 889	62
United States v. Murphy, Sixth Circuit, 413 F.2d 1129, cert. denied, 396 U.S. 896	26
United States v. Sisk, Sixth Circuit, 411 F.2d 1192, cert. denied, 396 U.S. 1018	27
Vavis v. Bomar, Sixth Circuit, 344 F.2d 84, cert. denied, 382 U.S. 883	67
Whitsell v. Perini, Sixth Circuit, 419 F.2d 95	22

SEVENTH CIRCUIT

Johnson v. United States, Seventh Circuit, 422 F.2d 282	20
United States v. Barney, Seventh Circuit, 371 F.2d 166, cert. denied, 387 U.S. 945; see also 1 A.L.R. 3rd 989	52
United States Ex Rel. Feeley v. Ragen, Seventh Circuit, 166 F.2d 976	11
United States v. Marine, Seventh Circuit, 413 F.2d 214, cert. denied, 396 U.S. 1001	26
United States v. Meek, Seventh Circuit, 388 F. 2d 936	36
United States v. Poole, Seventh Circuit, 379 F. 2d 645	43
United States v. Rubio, Seventh Circuit, 404 F. 2d 678, cert. denied, 394 U.S. 993	28
United States v. Stahl, Seventh Circuit, 393 F. 2d 101	29
Wilson v. Phend, Seventh Circuit, 417 F.2d 1197	23
Zurita v. United States, Seventh Circuit, 410 F. 2d 477	28

CASES — Page

EIGHTH CIRCUIT

Cantrell v. United States, Eighth Circuit, 413 F.2d 629, cert. denied, 396 U.S. 947, 396 U.S. 1031 — 27
Cardarello v. United States, Eighth Circuit, 375 F.2d 222, cert. denied, 389 U.S. 837 — 49
Cross v. United States, Eighth Circuit, 392 F.2d 360 — 33
Hass v. United States, Eighth Circuit, 344 F.2d 56 — 64
Hooper v. Swenson, Eighth Circuit, 401 F.2d 281, cert. denied, 393 U.S. 1109 — 29
Kress v. United States, Eighth Circuit, 411 F. 2d 16 — 26
Larry Buffalo Chief v. South Dakota, Eighth Circuit, 425 F.2d 281 — 18
Shaw v. United States, Eighth Circuit, 403 F.2d 528 — 27
Tanner v. United States, Eighth Circuit, 401 F. 2d 352 — 29
United States v. Meyer, Eighth Circuit, 417 F. 2d 1021 — 24

NINTH CIRCUIT

Andrews v. United States, Ninth Circuit, 403 F.2d 341 — 29
Argo v. United States, Ninth Circuit, 378 F.2d 301 — 47
Arnold v. United States, Ninth Circuit, 414 F. 2d 1064 — 26
Benson v. State Board of Parole & Probation, Ninth Circuit, 384 F.2d 238 — 39
Borchert v. United States, Ninth Circuit, 405 F.2d 735, cert. denied, 394 U.S. 972 — 28
Bush v. United States, Ninth Circuit, 393 F.2d 478 — 33

CASES	Page
Carter v. United States, Ninth Circuit, 373 F. 2d 911	50
Enriquez v. United States, Ninth Circuit, 338 F. 2d 165, cert. denied, 380 U.S. 957	63
Gairson v. Cupp, Ninth Circuit, 415 F.2d 352	25
Guillory v. Wilson, Ninth Circuit, 402 F.2d 34	29
Poole v. Fitzharris, Ninth Circuit, 396 F.2d 544	37
Reeves v. Wilson, Ninth Circuit, 398 F.2d 435	30
Sanchez v. United States, Ninth Circuit, 398 F.2d 799	31
Schantz v. Eyman, Ninth Circuit, 418 F.2d 11, cert. denied, 397 U.S. 1021	22
Smith v. United States, Ninth Circuit, 389 F.2d 564	33
United States v. Johnson, Ninth Circuit, 412 F.2d 1342	20
United States v. Speer and McCrea, Ninth Circuit, 388 F.2d 110	36
Vizcarra-Delgadillo v. United States, Ninth Circuit, 395 F.2d 70	37
Weller v. United States, Ninth Circuit, 369 F.2d 919	53
Wright v. Craven, Ninth Circuit, 412 F.2d 915	27
TENTH CIRCUIT	
Alire v. United States, Tenth Circuit, 365 F.2d 278	58
Allen v. Rodriguez, Tenth Circuit, 372 F.2d 116	52
Blockyou v. Crouse, Tenth Circuit, 364 F.2d 804	59
Guerra v. Rodriguez, Tenth Circuit, 372 F.2d 472	51
Johnson and Johnson v. United States, Tenth Circuit, 380 F.2d 810	42
Mize v. Crouse, Tenth Circuit, 399 F.2d 593	30
Opie v. Meacham, Tenth Circuit, 419 F.2d 465, cert. denied, 399 U.S. 927	21

CASES

Page

Sobota v. Rodriguez, Tenth Circuit, 371 F.2d 909 52
Williams v. Cox, Tenth Circuit, 1965, 350 F.2d 847, 849 61

LAW REVIEWS

American Bar Association Journal, Volume 55, Pages 254-256 4
American Law Reporter Annotated, Volume 24, Pages 1025-1038 67
Columbia Law Review, Volume 47, 1947, pp. 115-122 68
Harvard Law Review, Volume 78, Page 1434 16
Southwestern Law Review, Volume 22, No. 2, 1968, Page 260 8
Texas Bar Journal, Volume 33, No. 4, April 22, 1970, Page 294 5
Texas Law Review, Volume 41, 1962, Page 347 16
Virginia Law Review, Volume 49, 1963, Page 1531 16
United States Law Review, Volume 65, No. 1, 1931, Pages 6-8 67

CONSTITUTION OF THE UNITED STATES OF AMERICA

Sixth Amendment 13
Fourteenth Amendment 13

NO. 805

IN THE

Supreme Court of the United States

October Term, 1970

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

THADDEUS KING, JR., *Respondent*

RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

A. INTRODUCTION

The Petitioner, the State of Texas, has made application for writ of certiorari to this Honorable Court to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the captioned cause on July 6, 1970. See 429 F.2d 221.

B. LOWER COURTS' RULINGS

The Court's attention, as to the lower Courts' rulings, is directed to Appendix "A", the opinion of the Fifth

Circuit, and Appendix "B", the memorandum and order of the United States District Court for the Southern District of Texas, Houston Division. See Petitioner's Application, pages 23-26.

The response will be limited to replying to the three (3) questions the Petitioner has presented to this Honorable Court and Petitioner's statements regarding why the application for writ of certiorari should be granted.

C. FACTS OF CAUSE

A further recitation of the facts concerning this cause is considered unnecessary and this Honorable Court is directed to the decisions by the District Court and the Fifth Circuit found at 305 F. Supp. 636, and 429 F.2d 221. Further, as the Honorable Court of Appeals pointed out on page 222 of their opinion, the following is seen:

> . . . The District Court here, through its Findings of Facts, has chosen to discredit much of the testimony of the state's witnesses and to accept much of that of petitioner's witnesses. Such decision is supported by the record in this case. . . (222).

D. STATEMENT OF THE RESPONDENT REGARDING CONFLICTS OF THE CIRCUITS AND FACT QUESTION PRESENTED HAS NOT HERETOFORE BEEN SPECIFICALLY DECIDED BY THIS COURT

The Respondent does not quarrel with Petitioner's statements regarding the conflicts within the various Circuits regarding the issues involved in this application for writ of certiorari. Further, the Respondent does not quarrel with the fact the Federal questions herein have

not heretofore been specifically determined by this Honorable Court.

E. QUESTIONS PRESENTED AND RESPONSE THERETO

The Petitioner has presented the following questions for review:

> Under the circumstances, was King deprived of these rights protected by the:
>
> (1) due process clause of the Fourteenth Amendment even though he was not represented by appointed counsel;
>
> (2) due process and equal protection clause of the Fourteenth Amendment where the State of Texas had no actual notice of the inadequacies, misconduct, or lack of preparation of King's own attorneys.
>
> (3) Whether the State of Texas denied King "the Assistance of Counsel for his defense" that is guaranteed by the Sixth Amendment to the Constitution of the United States where he chose his own counsel to guide him through his trial.

When all of the questions have been asked and answered and the circle has been drawn, what the Petitioner, the State of Texas, is attempting to say to this Honorable Court is there is a Constitutional dichotomy between retained counsel and assigned counsel regarding the legal standards as to the competency of counsel and if an individual has retained counsel in a criminal trial he assumes full responsibility for the individual attorney's competency or incompetency to assist the accused in his defense.

Recently, an article of interest written by Hon. Sam Polur entitled "Retained Counsel, Assigned Counsel: Why the Dichotomy?" appeared in Volume 55, Pages 254-256, of the *American Bar Association Journal*.

In his conclusion, after reviewing many of the leading cases on this point, Mr. Polur said:

> I am not urging a new standard but vigorously proposing an abolition of the dual standard which now exists. This is not fair to the criminal accused who happens to have sufficient means to retain counsel. It surely demeans the constitutional bulwarks of equal protection of the laws and due process of law. Surely, each man accused and tried is entitled equally to the protective mantle of our Sixth Amendment's right to counsel. To give him less denigrates the American heritage of justice for all. (256).

There should be little question that when a client is convicted and receives more than his share of "justice" due to a criminal trial, that particular client is going to be unhappy. This is human nature. However, the Petitioner's concern seems to be that by holding the retained counsel to the same standard as the court appointed standard the gates to the penitentiary will be opened. This reasoning is specious to say the least.

The Petitioner is further saying that "The State of Texas did not deny Respondent the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution." The Supreme Court of Texas, however, is the State agency which brought into existence Respondent's trial attorney as a licensed member of the Bar. The Supreme Court of the State of Texas is also the State

agency which, indirectly at least, suspended Respondent's trial attorney for thirty-three (33) months where it was found that the same attorney substituted another person for his client in a workmen's compensation hearing. By formal complaint, the Respondent's trial attorney was charged with "conduct . . . so gross, deliberate, dishonorable and fraudulent as to require his disbarment from the further practice of law." See Volume 33, No. 4, April 22, 1970, *Texas Bar Journal*, page 294. The State giveth and the State taketh it away.

The average layman entrusts his destiny into the hands of a person the State of Texas has certified to be competent. The average layman probably has no more conception of an attorney's competency or incompetency than an attorney who relies upon a stranger physician for medical treatment.

Unquestionably, each case must be judged upon its own facts to determine whether an individual did or did not receive the effective assistance of counsel.

Also, it is the totality of the circumstances of a case in determining whether an individual did or did not have the effective assistance of counsel. Of course, in cases where the extremes are shown, courts have little difficulty in reaching the proper end result. It is in cases where the black and white join that the difficulty occurs.

Unless the individual is professionally trained to be an attorney, upon what basis can he stand up and say "Look Judge, this attorney does not know what he is doing." The chances are relatively good that the trial judge would make him sit down anyway.

And what is wrong with a trial judge guiding and steering the course of a man's defense if the trial judge

sees or can draw the inference that the attorney does not appear to be doing a good job?

Unfortunately, most attorneys go through on-the-job apprenticeship training and literally learn by doing; sometimes to the client's detriment. Some attorneys have garnered thirty years of experience but every year's experience is *a repeat* of the first year.

In the narrow issue presented by this Application for Writ of Certiorari, we are, of course, not dealing specifically with the following:

1. We are not concerned with the accused's per se right to counsel at trial either under the Federal Sixth or Fourteenth Amendments to the Constitution. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 79.

We are, of course, dealing with the grave issue of competency of counsel as a Constitutional issue under the Sixth and the Fourteenth Amendments to the Constitution where the individual had retained counsel and is tried in a court of law.

The progenitor of the right to counsel, as we probably know of that right today, is *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, 53 S.Ct. 55.

However, what is usually not recognized is that the right to counsel encompasses effective assistance of counsel.

It is submitted that *Powell*, supra, from the opinion, stands for two propositions:

1. The right to have counsel appointed by the trial court in a capital case; and

2. The right of counsel so appointed to have a reasonable period of time for preparation for trial.

Mr. Justice Sutherland stressed the importance of the former when he pointed out that it was not shown except by a colloquy several days after arraignment that an appointment of counsel had been made; but the record was blank as to whom, when or under what circumstances an appointment of counsel was made. As to the latter, conceding the right to counsel, his Honor pointed out:

> Not only was that not done here (the first proposition), but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. (the second proposition). (58)
>
> That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial. (59).

In discussing the applicability of the Sixth Amendment on the States Mr. Justice Sutherland further said:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226, 17 S.Ct.

> 581, 41 L.Ed. 979. If it is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts makes it clear that the right to the aid of counsel is of this fundamental character. (63).

This Honorable Court further held that the trial court failed to make an effective appointment of counsel and this, too, was a denial of due process within the meaning of the Fourteenth Amendment. (65). It is the latter statement which most authors appear to seize upon when discussing incompetency or ineffective assistance of counsel.

We have travelled far since *Powell, supra,* but the issue in this cause does not concern the focusing of attention on "first level implications", but on the more grave issue of the following: "If the Constitution requires more than "providing warm bodies with law degrees, then how much more?" "How good must counsel be in order to satisfy minimum constitutional requirements?" See James R. Craig, "The Right to Adequate Representation in the Criminal Process: Some Observations", Volume 22, No. 2, 1968, *Southwestern Law Review*, Page 260.

Probably the real question is the following: If an individual is entitled to have the assistance of counsel for his defense in a criminal trial, pursuant to the Sixth Amendment, does this assistance include the effective or competent assistance or will any type assistance do? What must a warm body with a law degree do?

In this cause, there is no question that the Respondent had a "warm body" standing beside him. A United States District Court and the Circuit Court for the Court of Appeals for the Fifth Circuit has held that this "warm body" was inadequate and ineffective to satisfy the Constitutional requirement of assistance of counsel.

Thus, to isolate the issue in this response is not to ignore those historical and revolutionary cases such as *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792; *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377; *Smith v. O'Grady*, 312 U.S. 329 61 S.Ct. 572, 85 L.Ed. 859; *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493; *Pointer v. Texas*, 380 U.S. 400, and *Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814, but to use them as a stepping stone and proceed directly into the waters of the ineffective, inadequate and incompetent attorney.

In *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, Mr. Justice Murphy, in a factual situation where the trial court, though advised of the possibility that conflicting interests might arise which would diminish an attorney's usefulness to the defendant for whom the attorney had entered his appearance as an associate counsel, appointed the attorney as the codefendant's counsel, held that this denied the defendant his right to have the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution. (467-468).

In *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167 former Mr. Justice Clark, writing for a unanimous court,

discussed a procedural rule of the State of Georgia which required that objections to a Grand Jury must be made before the Indictment is returned. It was held that the defendant Reece did not have the assistance of counsel until after he was indicted. Quoting from *Powell, supra*, Mr. Justice Clark said:

> The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard. Georgia should have considered Reece's motion to quash on its merits. (171).

In *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, Mr. Justice Reed also speaking for a unanimous court, it was held that the "denial of effective assistance of counsel does violate due process." (118). The Court concluded under the facts:

> We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury.
>
> We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment. (120).

This Honorable Court in *White v. Ragen*, 324 U.S. 760, 65 S.Ct. Rep. 978, where one of the Petitioners in that cause made allegations similar to the one at Bar, held:

> . . . it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel. (980).

Even though the Sixth Amendment does not contain the adjective "effective" as a modifier to the word "Assistance", it is submitted this is most certainly implied. In *Avery v. Alabama, supra*, Mr. Justice Black pointed out in his opinion that a warm body was not enough. "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." (322).

In *Michel v. Louisiana*, 350 U.S. 91, 76 Sup.Ct. Rep. 158, Mr. Justice Clark, again writing for a majority of the Court, discussed the allegation of denial of effective representation of counsel. The issue surrounded several alleged facts:

1. Failure to file a motion to quash;
2. Age of the attorney; and
3. Health of the attorney.

This Honorable Court, accepting the trial court's and the Supreme Court of Louisiana's findings that the facts did not show a lack of effective counsel, held, after considering that the attorney was a well-known criminal lawyer with nearly fifty years' experience at the bar, that: "The mere fact that a timely motion to quash was not filed does not overcome the presumption of effectiveness." *U. S. ex rel. Feeley v. Ragen*, 7 Cir., 166 F.2d 976. "The delay might be considered sound trial strategy, particularly since the codefendant could not be found." "We cannot infer lack of effective counsel from this circumstance alone." "Such an inference would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial." (164).

However, by the findings of fact by the District Court in the case at Bar, this Respondent, not in reference to

one thing, but many things, did not receive nor did he have the effective assistance of counsel during his trial.

Here, petitioner was arrested on January 24, 1966, almost nine months before his trial. In the early part of February, petitioner's aunt, Ola Jones, contacted an attorney to represent petitioner in the matters pending against him. A fee was agreed upon and paid. Thereafter this attorney, together with an associate, went to the Harris County Jail and talked to petitioner. At the examining trial the associate appeared on behalf of petitioner. Other than the first visit and the examining trial, neither the employed attorney nor his associate ever contacted petitioner again prior to his trial. At the trial, petitioner was represented by an attorney other than the retained attorney and his associate. The evidence is not clear as to whether this attorney was also an associate of the employed attorney, although he did share the same office. This attorney (the one appearing on behalf of petitioner at the trial) had a casual look at petitioner while petitioner was in jail, but no contact was had with petitioner and this attorney never visited with petitioner while petitioner was in jail. The one and only time this "trial attorney" ever conferred with petitioner was on the day of trial. That conference lasted something less than thirty minutes. Petitioner's trial began at 1:40 P.M. and ended the same afternoon at 3:15 P.M. When the state offered into evidence heroin, no objection was made, although the heroin introduced into evidence was heroin allegedly thrown from a car and picked up on the street. Apparently, no fingerprints were made of the package containing the heroin to determine whether petitioner actually handled it. Petitioner claimed to have had certain witnesses he wanted to call on his behalf, but the "trial attorney" refused to call them. At the habeas hearing the "trial attorney" testified

> he did not see any reason to put these witnesses on the stand even though he never talked to them. The only evidence the "trial attorney" offered on the point of whether or not in his opinion he rendered effective assistance of counsel was his expressed opinion that he did everything petitoner wanted him to do. This Court concludes that the "trial attorney" actually wanted petitioner to plead guilty but petitioner refused, expressing his innocence at that time. At the conclusion of the trial petitioner was sentenced to 16 years, even though from the time of his arrest to the present he has strongly insisted upon his innocence.
>
> The employed attorney's file consisted of a manila folder with petitioner's name on it. Inside the folder was a single sheet of paper which was blank except for the following: "Defendant, Thaddeus King, fee, $300.00." The only other notation on the file was the notation "10-9-66, Closed" which was initialed by the "trial attorney." The record is absolutely bare of any evidence of any work actually done in connection with petitioner's case. (305 F. Supp. 636, 638).

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him: to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States of America provides, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indubitably, unquestionably, and unequivocally, it should not be doubted that a warm body with a law license is insufficient. An attorney at law, if he is either court appointed or retained, has a duty, once he undertakes to represent an accused person or otherwise, to himself, his profession and his client to represent that client with zeal, confidence and intelligence. To go through the motions of representation is the antithesis of what is expected of competent, adequate and effective counsel.

Undoubtedly, to deny this application for certiorari or to grant this application for certiorari and affirm Respondent's position will bring about challenges by convicted persons on the competency of their trial counsel. However, are members of the Bar so weak that we fear such accusation if we have nothing to fear? It is submitted that if an attorney has been conscientious and honest, put forth his client's case with enthusiasm, made every effort to protect his client's rights, and has done everything conceivable to give his client his day in court, that, if challenged, it will be the client, not the attorney, who will be the worse for wear. It is respectfully submitted that if the attorney has done the above he has nothing to fear from a dissatisfied client. If he has not manifested the activities promulgating in effective assistance, then

he has only himself to blame. Cf. *Henderson v. Cardwell*, Sixth Circuit, 426 F.2d 150.

The State of Texas said on page 20 of it's Petition:

> In this situation, it is fair to say that Respondent is presumed to have acquiesced in all of his lawyer's activities unless he notified the court to the contrary. In view of the fact that Respondent has made his own choice of counsel, he must bear the responsibility for the consequences, or at least a much greater responsibility than the indigent defendant for his appointed counsel.

This reasoning is questionable, to say the least. How is a layman, unlearned in the law, with no showing of familiarity with courtroom procedures and techniques (except to appear in court to plead guilty on one (1) case) supposed to know when to tell his attorney when to object, when not to object, when to ask questions and when not to ask questions. The client puts his faith in the lawyer to do his job.

Counsel for Respondent cannot better put the issue than District Judge Roberts did in *Breedlove v. Beto*, 404 F.2d 1019, wherein he said:

> "One of the appellant's other points, which we will not decide because the Jackson v. Denno point is dispositive, is that his retained attorney was so ineffective as to amount to an unconstitutional denial of counsel. The State's reply to this contention was that this issue can arise only when the attorney is appointed by the Court.
>
> "The majority of decisions have drawn no distinction between retained counsel and appointed counsel in the consideration of the adequacy-of-counsel question.

See e.g., Wilson v. Rose, 9th Cir. 1966, 366 F.2d 611, 615; Craig v. United States, 6th Cir. 1954, 217 F.2d 355, 358-359; Abraham v. State, 1950, 228 Ind. 179, 91 N.E.2d 358, 361. The writers on the question of inadequate counsel unanimously condemn any attempt to block inquiry into the adequacy of retained counsel. See Craig, The Right To Adequate Representation in the Criminal Process: Some Observations, 1968, 22 Sw. L. J. 260, 272; Note 78 Harv. L. Rev. 1434, 1965; Note 49 Va. L. Rev. 1531, 1963. These authorities conclude that the test should not be whether the state denied the effective assistance of counsel, but whether defendant was denied a fair trial because he did not have effective representation.

"The minority viewpoint, urged by the State in this case, is that no unconstitutional denial of effective counsel can occur unless State officials outwardly prevent the privately retained counsel from performing his duties.

"The first argument for this viewpoint is that since there is no state action, there can be no denial of the Fourteenth Amendment right to a fair trial. However, the majority viewpoint's reply is that in light of the rationale of Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, which held that the state participation in an unconstitutional activity was sufficient state action to invoke the Fourteenth Amendment, this argument cannot stand because if there was in fact incompetent counsel under the standards for appointed counsel, the state's participation in the trial which was fundamentally unfair because of the incompetent retained counsel is sufficient state action. See generally, Williams, The Twilight of State Action, 1962, 41 Texas L. Rev. 347. The second rationale of the minority viewpoint is that since defendant selected the lawyer, he is presumed to acquiesce in all of his attorney's activities.

> Yet, the majority's reply is that the basis of the Gideon requirement—that a man is not competent to represent himself at a criminal trial—seems to require the conclusion that he is incompetent to evaluate accurately the ability of his lawyer before the trial or the quality of representation at the trial. Although the test for whether there was unconstitutionally ineffective counsel is clear, see Williams v. Beto, 5th Cir. 1967, 386 F.2d 16, the Fifth Circuit's position is in doubt on this issue of whether the inquiry is limited to appointed counsel and not retained counsel. In a recent per curiam opinion, the minority viewpoint appears to be espoused. Howard v. Beto, 5th Cir. 1968, 375 F.2d 441, 442. However, in another Fifth Circuit opinion, Judge Brown articulates the majority viewpoint. Porter v. United States 5th Cir. 1962, 298 F.2d 416, 463."

In *Scott v. United States*, District of Columbia Circuit, 1970, 427 F.2d 609, that Honorable Court pointed out:

> . . . the issue is whether counsel's assistance was so inadequate as to make the trial a farce and a mockery. That standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness. Bruce v. United States, 126 U.S. App. D.C. 336, 339, 379 F.2d 113, 1136 (1967). The "farce and mockery" standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) with Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The appropriate standard for ineffective assistance of counsel, as set forth in Bruce, supra,

is whether gross incompetence blotted out the essence of a substantial defense. (610).

It should be understood that not every mistake of judgment or misconception of the law renders an attorney incompetent or ineffective or inadequate. However, most jurisdictions refer to the mockery principle. Further, ineffective assistance cannot be predicated upon some isolated act or omission. See *Holnagel v. Kropp*, Sixth Circuit, 426 F.2d 777, and *United States v. Phillips*, Second Circuit, 426 F.2d 1069.

Mere failure to make objections is not sufficient to establish incompetence of counsel. *Henderson v. Cardwell*, 425 F.2d 181, supra.

Failure to subpoenae a witness is not sufficient. *United States v. Grimes*, Fifth Circuit, 426 F.2d 706, and *Fitts v. United States*, Fifth Circuit, 406 F.2d 518.

If there is a possible conflict of interest between two (2) defendants and one or both makes an intelligent and intentional waiver of severance, then one or both cannot later complain. *Larry Buffalo Chief v. South Dakota*, Eighth Circuit, 425 F.2d 271.

Mere failure to achieve acquittal is insufficient. *United States v. Hammonds*, United States Court of Appeals, D.C. Circuit, 425 D.2d 597. However in Hammonds, *Ibid.*, the defendant was held to be denied the effective assistance of counsel by virtue of the totality of the omissions and errors, and particularly the futile closing argument. The Court's attention is directed to the discussion of rules concerning the issue of ineffective assistance of counsel. (600-602). Cf. *United States v. Katz*, Second Circuit, 425 F.2d 929.

Judge Rives of the Fifth Circuit in *United States v. Mancuso*, 423 F.2d 23, said that the "perfunctory, bad faith, sham, pretense, lack of conference and preparation," standard should be discarded and a stricter standard should be enunciated regarding competence of counsel.

"Effectiveness of counsel is not tested merely by counsel's performance in the courtroom but must also be measured by the attorney's familiarity with the facts and the law of the case." *Hollingshead v. Wainwright*, Fifth Circuit, 423 F.2d 1059.

The Fifth Circuit reversed a court appointed situation in *Windom v. Cook*, 423 F.2d 721, where is was shown that counsel had only one brief interview with the defendant; at which time counsel did not discuss the elements of the crimes, did not make any effort to find out the facts of the case, and did not attack the composition of the grand jury.

Further, it is not the method used in obtaining counsel, the time spent, and the possibilities of unused defenses which count regarding pleas of guilty which will render counsel ineffective. See *Lamb v. Beto*, Fifth Circuit, 423 F.2d 85.

In a *Glasser*, supra, situation, the Fifth Circuit in *Baker v. Wainwright*, 422 F.2d 145, reversed for deprivation of effective assistance of counsel where the same attorney represented two co-defendants. Cf. *Walker v. United States*, Third Circuit, 422 F.2d 375; *United States v. Lovano*, Second Circuit, 420 F.2d 769, and *United States v. Cale*, Sixth Circuit, 419 F.2d 897

See also *White v. United States*, 5th Circuit, 396 F.2d 282. In an unusual situation regarding the issue of in-

effective assistance of counsel, the Seventh Circuit, in *Johnson v. United States*, 422 F.2d 555, not being able to determine whether the defendant was challenging the effectiveness of his trial counsel, but of counsel who failed to file a bill of exception, denied relief.

In *Caraway v. Beto*, Fifth Circuit, 421 F.2d 636, a court appointed attorney was held ineffective where he visited the defendant only once three days before trial and this conference lasted just fifteen minutes, but the conference did not involve a discussion of possible defenses nor the advisability of pleading guilty. No information was sought concerning witnesses and no attempt was made to interview any witnesses.

No objection was made to exhibits offered into evidence. Further, evidence of an extraneous offense was admitted.

In *Harris v. Dees*, Fifth Circuit, 412 F.2d 1079, in answer to the challenge of competency, the Court answered step by step the objections to counsel's activities.

In one of the few cases involving the challenge of ineffective assistance of counsel on appeal, the Court's attention is directed to *U. S. v. Johnson*, Ninth Circuit, 412 F.2d 1342. After discussing the issues, the Court held that the contentions urged were not arguable and were therefore frivolous.

In the realm of representing co-defendants, the best stated rule regarding ineffective assistance of counsel where this occurs is as follows:

> The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been

denied the effective assistance of counsel. *U. S. v. Lorano*, Second Circuit, 420 F.2d 769. (773).

In *Kelly v. Peyton, Fourth Circuit*, 420 F.2d 912, it was pointed out that the magistrate who signs the warrants for a defendant's arrest may not later represent him in Court. Thus, if an attorney has a conflicting interest, he cannot act with that degree of loyalty which effective representation requires. The interesting facet of *Kelley, Ibid.*, is that the first issue was discussed under the issue of *depriviation* of the effective assistance of counsel whereas the failure of the attorney to consult with the client fell within the realm of *ineffective* representation.

The Sixth Circuit, as pointed out in *Kelley, Ibid.*, also follows the non-distinction between retained and appointed counsel. (914).

The District of Columbia Circuit, in *Spriggs v. Wilson*, 419 F.2d 831, where a trial judge, in his chambers, after reviewing a draft classification file, decided there was a basis for the classification and then granted the defendant a continuance, held the expeditious manner of trying the case denied the defendant effective assistance of counsel.

"Lack of diligence in discovering evidence which was not used at the trial is not necessarily to be equated with ineffective assistance of counsel." Quoted from *Opie v. Meacham, Tenth Circuit*, 419 F.2d 465. However, the newly discovered evidence would have impeached or contradicted some of the witnesses who testified.

The necessity of showing of injury is well put by the Fifth Circuit in *United States v. Long*, 419 F.2d 91. Two days before trial counsel notified the court he had been retained. Prior thereto, the defendant had other retained

counsel who never officially withdrew from the case. A motion for continuance was overruled. It appears there was no showing of what a continuance would have accomplished was made; thus, no ineffective assistance of counsel. See also *United States v. Valdez*, Fifth Circuit, 418 F.2d 363.

Where the evidence is overwhelming as to the guilt of the accused, his chance of upsetting a conviction on the ground of ineffective assistance of counsel is slim where he makes claims his attorney did this or did not do that during the trial. See *Whitsell v. Perini*, Sixth Circuit, 419 F.2d 95. However, what about the sentencing and punishment phases? In other words, when does the trial attorney's function cease as to being adequate and effective for his client?

The distinction between a direct appeal attack and a collateral attack, in the realm of ineffective assistance of counsel, is, of course, always present. See *Heard v. United States*, District of Columbia Circuit, 419 F.2d 682.

The mere fact that counsel is absent during part of the trial is insufficient, in itself, to sustain ineffective assistance of counsel. However, in *Henderson v. United States*, Fifth Circuit, 419 F.2d 1277, it was emphasized that nothing harmful occurred to the accused.

In the area of *Massiah v. United States*, 377 United States 201, 84 S.Ct. 1926, 18 L.Ed. 2d 246, and *Wade v. United States*, 386 United States, 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149, it was held in *Schantz v. Eyman*, Ninth Circuit, 418 F.2d 11, that the defendant was denied the assistance of counsel where, in a post-indictment situation, the county attorney sent a psychiatrist to the home

of the defendant, requested an interview for the purpose of making a psychiatric examination, was refused and then proved at the trial this refusal.

An accused who lays the groundwork for later claiming ineffective assistance of counsel gets no relief from the courts. In *Cohen v. Wainwright*, Fifth Circuit, 418 F.2d 565, the defendant on the date of the trial, told the court that his attorney of record was not really his trial attorney but his writ of habeas corpus attorney. The court held there was no error in putting the defendant to trial without granting a continuance. The "writ of habeas corpus attorney" became the trial attorney. See also *United States v. Johnson and Bradley*, Fifth Circuit, 417 F.2d 332, where the defendants discharged retained counsel, asked for and received court appointed counsel, and then asked for and received a one day continuance.

Even though it may not be difficult to conceive of bizarre factual situations involving an attorney-client relationship, one of the best is shown by *Wilson v. Phend*, Seventh Circuit, 417 F.2d 1197. There the retained attorney was also the owner, editor and publisher of a daily newspaper distributed throughout the county. The particular case for which that defendant was tried apparently received a great deal of publicity; in *his* attorney's newspaper as well as others, with little of the publicity being advantageous to the accused. There was little communication between the parties prior to trial; no motions for change of venue or continuance were made and the attorney did not pursue leads for witnesses or evidence furnished by the accused. After trial, things did not change much. No motion for new trial was filed. The Seventh Circuit, Judge Cummings speaking for the Court, unanimously held:

> These assumed facts, taken together, are clearly sufficient to indicate that defendant was convicted without the benefit of effective counsel, as required by the Sixth and Fourteenth Amendments to the United States Constitution. (1199).

In discussing the fact there is no distinction between retained and court appointed counsel, the Court further said:

> In our decision in Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957), we held that self-retained counsel may be so inadequate and incompetent as to deprive the accused of representation and reduce the trial to a shame in deprivation of his rights to due process of law. . .
>
> The distinction between retained and appointed counsel overlooks the fact that, in either case, the State has obtained a conviction against the accused under such grossly unfair circumstances as to cast doubt upon the factual basis upon which proof of guilt rests. We agree with other courts which have held that in such circumstances sufficient state action exists to invoke the protections of the Fourteenth Amendment. Wilson v. Rose, 366 F.2d 611, 615-616 (9th Cir. 1966): Whitaker v. Warden, 362 F.2d 838, 841 (4th Cir. 1966); Jones v. Huff, 80 United States App. D.C. 254, 152 F.2d 14, 15-16 (1945); Porter v. United States, 298 F.2d 643, 463, 464 (5th Cir. 1962). (1200).

A failure of the trial attorney to make and file a motion to suppress evidence where such action is a reasonable trial tactic is not grounds to complain. *U. S. v. Meyer*, Eighth Cir., 417 F.2d 1021.

Innocuous comments by the trial judge to the defense attorney are insufficient to complain. *U. S. v. Johnson*, Fifth Circuit, 417 F.2d 332.

The Ninth Cireuit, in *Gairson v. Cupp*, 415 F.2d 352, held that failure of the defendant's retained counsel to advise the defendant of his right to appeal his conviction deprived the defendant of his constitutional right to effective trial counsel. Citing *Gideon*, supra, as authority, the Court said:

> Appellant was entitled to effective representation by counsel during his trial as a matter of constitutional right . . . He is also entitled to counsel on appeal . . . Trial counsel does not have an obligation to represent his client on appeal. But when trial counsel knows that his client is not represented by appellate counsel, knows that his client is indigent, knows that his client is not represented by appellate counsel, and knows that his client is ignorant of the availability of an indigent appeal and of the procedure for instituting such an appeal, the trial attorney has an affirmative duty to protect his client's right to appeal by filing a notice of appeal, or by telling his client how the client can proceed on his own behalf. A trial attorney who has failed to perform that duty has ineffectively represented his client . . . The failure of appellant's right to appeal resulted in a deprivation of the assistance of effective trial counsel. (Cf. United States ex rel. Maselli v. Reincke (2d Cir. 1967) 383 F.2d 129; Wynn v. Page (10th Cir. 1966) 369 F.2d 930; see Doyle v. United States (9th Cir. 1966) 366 F.2d 394, at 398-399) (353-354). Leventhal v. Govin, 1st Circuit, 396 F.2d 441. See also Byrd v. Smith, Fifth Circuit, 407 F.2d 363; Atilus v. United States, Fifth Circuit, 406 F.2d 694. See also Turner v. North Carolina, Fourth Circuit, 412 F.2d 486.

Can an individual defendant who voluntarily and intelligently waives the right to licensed counsel, nevertheless, challenge his own ineffectiveness of the assitance of counsel where he represents himself? See *Arnold v. United States*, Ninth Circuit, 414 F.2d 1064. There, the "layman-attorney" claimed that his refusal of an offer to dismiss a count of the indictment involving the death penalty would have, if he had been a licensed attorney, been grounds for disbarment as incompetent to further practice law. The Court said "Not so" as "Errors of judgment exemplify neither incompetent nor inadequate representation." (1060). See also *Osborne v. United States*, 4th Circuit 371 F.2d 912 (923).

Although it is recognized that an accused has the right to counsel at every stage where assistance of counsel is critical, the fact that one does not have counsel at a particular proceeding or stage does not vitiate his conviction unless he was prejudiced. *United States v. Murphy*, Sixth Circuit, 413 F.2d 1129.

Even where trial counsel confesses unfamiliarity and lack of preparation, if the record reveals otherwise, there is no denial of effective assistance of counsel. *United States v. Marine*, Seventh Circuit, 413 F.2d 214.

Also, where the attorney overcooperates, he is likely to be challenged, if the client is convicted. However, the client or ex-client runs into the gauntlet of the presumption of competency, whether retained or court appointed.

> In *Kress v. United States*, 411 F.2d 16 (8 Cir. 1969), this court very recently affirmed old and established principles by stating that there is a presumption of competency of court appointed counsel; that the requirement of the Sixth Amendments is met when-

> ever the accused is supplied with counsel who exercises the judgment expected of one trained in the law and committed to the diligent application of its principles; and that a petitioner will prevail on this issue only if it can be said that what the attorney did or did not do made the proceedings a mockery and shocking to the conscience of the court. Slawek v. United States, Eighth Circuit, 413 F.2d 957. (959).

Also, if a defendant enters a plea of guilty, his later wishful thinking will get him little relief. See *Cantrell v. United States*, Eighth Circuit, 413 F.2d 629.

Lack of rapport between an accused and his court appointed counsel will generally not rise to the level of a claim of deprivation of a constitutional right. See *Lamoreux v. Massachusetts*, First Circuit, 412 F.2d 710; *Shaw v. Uniter States*, Eighth Circuit, 403 F.2d 528, cf. *U. S. v. Rundle*, Third Circuit, 394 F.2d 748.

Again, the lack of preparation or allowance of time for preparation goes to injury. How was the accused injured? Merely because his attorney was appointed two (2) days before trial, in itself, is insufficient to sustain ineffective assistance of counsel. See *Foster v. Beto*, Fifth Circuit, 412 F.2d 892, and *U. S. v. Sisk*, Sixth Circuit, 411 F.2d 1192.

The Courts will not ordinarily second guess an attorney's cross examination, even if it could have been more exhaustive. See *United States v. Pearce*, Fourth Circuit, 412 F.2d 895.

The fact that an attorney presents too many defenses goes to trial strategy and is not grounds for ineffective assistance of counsel. *Wright v. Craven*, Ninth Circuit, 412 F.2d 915.

A conflict of interest allegation may afford an accused relief. In *Zurita v. U. S., Seventh Circuit,* 410 F.2d 477, where the accused had retained counsel at trial and then retained counsel was appointed on the appeal, it was pointed out that where the attorney had business dealings with the robbed bank, this, in itself, called for an evidentiary hearing. See also *Goitia v. U. S.,* First Circuit, 409 F.2d 524.

The Ninth Circuit, in determining the incompetency or ineffectiveness of counsel, uses the perfunctory, bad faith, sham, pretense, farce, mockery, shocking to the court's conscience, and lack of opportunity for conference and preparation standard as enunciated in *Williams v. Beto,* Fifth Circuit, 354 F.2d 698. See *Borchert v. U. S.,* Ninth Circuit, 405 F.2d 735.

Ordinarily, a client is bound by his attorney's actions. Cf. *Brookhart v. Janis,* 86 S.Ct. 1245, and *Henry v. Mississippi,* 85 S.Ct. 564.

The issue of adequacy of counsel and effective assistance of counsel regarding juvenile proceedings is seen in *Haziel v. U. S.,* U.S.C.A., D.C., 404 F.2d 1275.

A unique theory case, without obtaining any relief, is *U. S. v. Rubio,* Seventh Circuit, 404 F.2d 678, where the defendant was charged with a narcotics violation. At the time of his arrest, a sizeable sum of money was seized. The Defendant contended that by failure of the Government to return all or part of the money (the Government eventually returned $1,000.00) deprived him of the effective assistance of counsel. The Defendant failed because the failure, alone, to return the money did not raise a constitutional violation. No prejudice was shown to have resulted to the defendant.

The Ninth Circuit, as shown by *Andrews v. U. S.*, 403 F.2d 341, which does not use the farce or mockery test but simply whether the representation fell below minimum constitutional standards, held, from the face of the record, that counsel's defaults rendered him ineffective.

The fact that a defendant's hearing aid battery runs down will not result in his being denied the effective assistance of counsel unless objections are made and the record shows that the defendant could not hear or had difficulty in hearing. See *Guillory v. Wilson*, Ninth Circuit, 402 F.2d 34.

The Fifth Circuit has used the farce and mockery of justice standard for many years. However, it also uses the denial of fundamental fairness test. See *Campbell v. U. S.*, Fifth Circuit, 401 F.2d 894.

So called "nit-picking" and finding commissions and omissions of trial counsel usually do not sustain the challenge of ineffective assistance of counsel. See *Tanner v. U. S.*, Eighth Circuit, 401 F.2d 281.

Failure to file a motion for new trial is generally not grounds for error as being denied effective assistance of counsel. *Hooper v. Swenson*, Eighth Circuit, 401 F.2d 352.

A rather interesting case involving individuals who were not indigent and desired to retain their own counsel, but who could not make up their minds and how their ingenuousness prolonged their cases is *Bostick v. U. S.*, Fifth Circuit, 400 F.2d 449; Cert. Denied, 89 S.Ct. 725. See also *U. S. v. Stahl*, Seventh Circuit, 393 F.2d 101.

The fact that the trial judge was on the trial attorney's disciplinary committee concerning unethical behavior in

conducting the defendant's defense did not deprive the defendant of the effective assistance of counsel. *U. S. v. Cook*, Fourth Circuit, 400 F.2d 877.

A troublesome area of the Sixth Amendment will, undoubtedly, extend to the bilateral versus unilateral activities of trial counsel in making objections, failing to make objections and, in general, conducting the trial strategy of a criminal case. See *Mize v. Crouse*, Tenth Circuit, 399 F.2d 593.

A defendant has a rough road to hoe if he has pled guilty and later wishes to challenge the effectiveness of his counsel. See *White v. Beto*, Fifth Circuit, 399 F.2d 302, and *Reeves v. Wilson*, Ninth Circuit, 395 F.2d 435.

In a factual situation involving several interesting facets to the issue at Bar, the Court's attention is directed to *Marxuach v. U. S.*, First Circuit, 398 F.2d 548. There, one attorney started out representing both defendants. Thereafter, a second attorney entered as co-counsel. On the day the jury was ordered to be empanelled, one of the defendants failed to appear because of illness. On the same day, a bomb was discovered in an automobile of a government witness. When the court inquired if the defendants' attorneys knew anything about it, one of the attorney's (the second) had to be hospitalized. Thereafter, the trial court overruled a motion for continuance and tried the co-defendant who had also absented himself and was located in a hospital, and was brought to court by a marshal. The attorney who went to trial testified that he had "inconvenience" with the English language and was unfamiliar with the Federal rules. It appears that from the record this attorney was easier to understand than the first attorney and also showed the attorney had more than an ade-

quate command of the English language. The Court found no error.

Failure to elicit testimony of an exculpatory nature while a defendant is on the stand will not render a trial a farce. "There must be some showing that such evidence was available at the trial." (800) *Sanchez v. U. S.*, Ninth Circuit, 398 F.2d 799.

Many times, an attorney's inadvertance will cause him to be held ineffective. This was shown in *Calloway v. Powell*, Fifth Circuit, 393 F.2d 886, opinion by Circuit Judge Godbold, where an attorney was appointed orally to appear at a preliminary hearing. When the attorney showed up, the defendant, probably unknown to the attorney, through his family, had not one but two retained attorneys. When the arraignment was set, appointed counsel was notified to appear in Court. The appointed counsel made the mistake by continuing on the case and eventually inducing the defendant to plead guilty. Judge Godbold said:

> This case is another instance of the hiatus which arises at times between counsel thought to be retained, or retained and not paid, or retained for a limited purpose, and the appointed counsel. The frequency of the hiatus can be ameliorated by clear and definite requirements for entry of appearances as counsel of record and for withdrawal of appearances only with leave of court, by appointments of counsel terminable only on requests of record and with leave of court, and by requests for continuances by appointed attorneys who find that because of misunderstanding as to who is representing the accused they are not prepared to furnish representation meeting constitutional requirements. Short of waiver or

fault of the defendant, neither of which is proved in this case, confusion among attorneys about who is to represent the criminal defendant cannot erode away his right to effective counsel.

The counsel here furnished did not meet constitutional standards. The right to counsel is the right to effective counsel. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). This Court has interpreted counsel to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). Effective counsel includes familiarity of counsel with the case and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his options. Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967); Roberts v. Dutton, 368 F.2d 465 (5th Cir. 1966); see Collingsworth v. Mayo, 173 F.2d 695 (5th Cir. 1949). An accused represented by appointed counsel has a right to expect a measure of devotion to his cause at least equal to that expected from retained counsel of the accused's own choosing. Johnson v. U. S., 328 F.2d 605 (5th Cir. 1964). Under the circumstances revealed by this record it is apparent that appointed counsel, surprised by being called to the arraignment and having only a brief conference with the accused in the courtroom, did not measure up to constitutional requirements. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). The absence of constitutional standards is underscored by the defendant's felt necessity to seek the advice of the sheriff's department investigator before entering his plea.

Merely because a defendant claims his attorney did not interview and call certain witnesses is insufficient

unless it is shown what materiality they would have added to the case. See *Bush v. U. S.*, Ninth Circuit, 393 F.2d 478.

In *Cross v. U. S.*, Eighth Circuit, 392 F.2d 360, it was held that in light of defense counsel's statement to the trial court that his willful neglect of duty resulted in the defendant's case not being investigated or developed called for an evidentiary hearing. Both the defendant and the attorney got hearings in this case.

Chief Justice Burger, in *Harried v. U. S.*, D.C. C.A., 389 F.2d 281, where the defendant had retained counsel, discussed the issues raised in that case concerning the charge of ineffective assistance of counsel revolving around trial strategy and tactics. However, the Court dissected each of the grounds raised to show that ineffective assistance of counsel was not sustained by the facts.

Interesting dicta that the charge of ineffective assistance of counsel constitutes an occupational hazard of defending certain cases is found in *Smith v. U. S.*, Ninth Circuit, 389 F.2d 564.

Failure to ask for a change of venue is, by itself, insufficient to support a charge of ineffective assistance of counsel. *Morton v. Henderson, Sixth Circuit*, 389 F.2d 699.

The homemade version of a public defender system was taken to task in *Coles v. Peyton*, Fourth Circuit, 389 F.2d 224. The dissenting opinion felt differently about the merits of the charge of ineffective assistance of counsel than did the majority of the Court. However, Circuit Judge Winter's statements, in a clear and orderly fashion

regarding what is expected of counsel, contain more of "things" to do in order to satisfy the requirement of effective and adequate assistance of counsel.

> Included among the things that counsel admitted they did not do are the following: Counsel made no investigation of the reputation of the prosecutrix for chastity. Counsel made no attempt to determine the identity of, or to interview the prosecutrix's male companion. Counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be. Counsel did not explain the elements of the crime of forcible rape to petitioner, including the necessity of proof of penetration, and question him in regard thereto. In short, counsel did no more than interview petitioner on the three occasions previously alluded to and to accept the statements he made to them during the interview. Counsel were unequivocal that they did not know that the prosecutrix had been examined medically and that they had no knowledge of the written, signed medical report.
>
> To support our conclusion that petitioner is entitled to a writ of habeas corpus, we need look only to the principles to be distilled from Twiford v. Peyton, 372 F.2d 670 (4 Cir. 1967); Martin v. Commonwealth of Virginia, 365 F.2d 549 (4 Cir. 1966); Braxton v. Peyton, 365 F.2d 563 (4 Cir. 1966); and earlier authorities, and apply them to the facts of this case. The principles may be simply stated: Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable.

Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

Although counsel for petitioner were appointed over three weeks prior to trial, the delay of almost three months in their appointment and the fact that they were appointed to represent such a great number of other defendants to be tried at a forthcoming term of court constitutes a colorable fact. Perhaps the burden of representing so many persons accused of felonies explains the woefully inadequate services rendered to petitioner. Whatever the reason, the services of counsel were ineffective in at least several regards.

The record is clear that counsel did not explain the elements of the crime of rape to petitioner, especially the element of penetration. If the recollection of one of petitioner's counsel was accurate that petitioner was "trying" to have intercourse with the prosecutrix, penetration may not have occurred, in which event, under Virginia law the substantive crime would not have been committed. McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540 (1951). Effective representation of counsel would require exploration of this possibility under the facts of the case.

Virginia law also interposes consent as an absolute bar to a prosecution for rape when the alleged victim is over the age of consent, and previous want of chastity is relevant and probative evidence of consent. Bailey v. Commonwealth, 82 Va. 107 (1886); Va. Code Ann. § 18.1-44 (1960 Repl.

> Vol.). Even if counsel were satisfied that lack of penetration was unavailable as a defense, effective representation would require some investigation of the reputation of the prosecutrix for chastity under the facts of this case, especially when petitioner's version of the incident, as understood by both of his counsel, was that he had an encounter with a common street walker. Effective representation would similarly require some investigation to determine the identity of, and some attempt to interview, the male companion of the prosecutrix and some attempt to interview Carrie Herbert to ascertain if evidence to support a defense of consent could be uncovered. Similarly, some inquiry should have been made to ascertain if the prosecutrix were medically examined, not only because the report which was in existence would be proof supporting a lack of penetration, but also because the report disclosed the identity of the medical examiners from whom inquiry could be made as to whether their examination disclosed the presence or absence of signs of physical violence on the person of the prosecutrix with its direct relevance to the question of consent.

Merely by cumulating errors of trial counsel will not get any relief unless one can show where a different result would have altered the end result. See *Speer and McCrea*, Ninth Circuit, 388 F.2d 110.

However, even though in making a determination of whether an attorney was or was not effective, adequate or competent, constitutes second guessing, most courts shy away from the term or phrase "second guessing." Again, it is not what the attorney did or did not do which will result in the attorney being held ineffective, but whether what he did or did not do constituted substantial prejudice to the defendant. See *U. S. v. Meek*, Seventh Circuit, 388 F.2d 936.

As seen above, it is usually the dissent who sees the case differently from the majority opinion as to holding an attorney to have been ineffective. The reverse of this was seen in *Daugherty v. Beto*, Fifth Circuit, 388 F.2d 810. Circuit Judge Rives felt that at least part of the standard of effective assistance of counsel should be the same whether the defendant had retained or court appointed counsel. If an attorney had a court appointed client he is entitled to the same type of representation expected of an attorney with a well heeled client.

Many times, it is the omission of disclosure to the client which will get the attorney in hot water. However, most courts follow the "exceptional circumstances" rule that the client is bound by the omissions of his attorney; such as the stipulation of evidence and waiver of confrontation of witnesses. See *Poole v. Fitzharris*, Ninth Circuit, 396 F.2d 544.

The Fifth Circuit has also discarded the time factor as controlling. As Circuit Judge Coleman said in *Doughty v. Beto*, Fifth Circuit, 396 F.2d 128:

> When the proof shows that a defendant is fully informed of his rights, admits his guilt, and is relieved of the likelihood of a life sentence, we cannot condemn the efforts of an attorney as being ineffective. The time spent is only one of the elements to be considered and the totality of the facts may not be over-ridden by a judicial stop watch. (130).

It is not unusual for judges, as well as attorneys, to look at a record and reach a different conclusion regarding competency or effective assistance of counsel. In *Vizcarra-Delgadillo v. U. S.*, Ninth Circuit, 395 F.2d 70, the majority of the Court gave defense counsel a pat on

the back. The minority, concluding that counsel's efforts were directed at achieving a legally impossible result because of counsel's erroneous interpretation of the law, took counsel to task on his lack of knowledge of the law; the course of pursuit; the lack of investigation; and the lack of information conveyed to the defendant regarding the consequences of his plea. Circuit Judge Browning's statement, in essence that it is not how you played the game yesterday, but how you play today which is what counts, is appropros to many cases:

> The question is not whether appellant's counsel was qualified by training and experience to render effective legal assistance to appellant, but whether he did so. Brubaker v. Dickson, 310 F.2d, supra at 37. The record demonstrates that he did not. (74). See also Coles v. Peyton, 4th Circuit, 389 F.2d 224.

A trial judge, by overstepping his bounds of propriety in commenting upon the evidence and in lengthily and partisanly interrogating witnesses in the presence of the jury may result in depriving a defendant of his right to an impartial trial such as to deprive him of effective assistance of counsel. See *Bursten v. U. S.*, Fifth Circuit, 395 F.2d 976.

What is the effect on a defendant if he is represented by an attorney-imposter? His conviction is void and the subsequent use at a new trial of evidence presented during the void trial will entitle him to a new trial. See *Harrison v. U. S.*, D.C. C.A., 387 F.2d 203.

The fact that trial counsel had previously defended the government's informer and main witness will not, standing alone, gain a defendant relief. See *Harrison v. U. S.*, Fifth Circuit, 387 F.2d 614.

Circuit Judge Jameson of the Ninth Circuit in *Benson v. State Board of Parole & Probation, et al.*, 384 F.2d 238, said that counsel's "inability to make a silk purse out of a sow's ear ought not reflect on their competency" (241).

In *U. S. v. Reinecke*, Second Circuit, 383 F.2d 129, in discussing the distinction between tactical or strategic errors and failure to show any prejudicial errors, Circuit Judge Waterman, writing in answer to the State's contention that unless it is shown that counsel's incompetency is attributable to the State a defendant may not complain, said:

> Nevertheless, the State contends that collateral relief from a state conviction may not be had unless counsel's incompetency may be attributed to the State, citing Farrell v. Lanagan, 166 F.2d 845 (1 Cir.), cert. denied, 334 U.S. 853, 68 S.Ct. 1509, 92 L.Ed. 1775 (1948). Such incompetency, it is urged, must be of the sort of which the trial court may take cognizance and which it has a duty to correct. It cannot be gainsaid that this position has its proponents. See, e.g., Davis v. Bomar, 344 F.2d 84 (6 Cir.), cert. denied, 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965); see U.S. ex rel. Darcy v. Handy, 203 F.2d 407, 427 (3 Cir. 1953). Other courts, however, have more wisely focused their attention on the merits of each claim of incompetency of counsel, see, e.g., U.S. ex rel. Fazio v. Fay, supra; U.S. v. Garguilo, supra; Snead v. Smyth, 273 F.2d 838 (4 Cir. 1959); Riddle v. McLeod, 240 F.2d 206 (10 Cir. 1957), thereby insuring that each defendant has received the fundamental fairness required by the Fourteenth Amendment. While it is clear that certain acts of incompetency may occur in the presence of and be obvious to the trial court,

see, e.g., U.S. ex rel. Darcy v. Handy, supra, it is equally clear that many forms of ineffective assistance of counsel will not, as here, be readily apparent to the trial court. Note, Effective Assistance of Counsel, 49 Va. L. Rev. 1531, 1554 (1963). It is no answer to presume that an accused defendant acquiesces in the errors of his retained counsel unless he notifies the trial court that he is not acquescing therein; the average defendant would be unlikely to discover his lawyer's inadequacies until it is too late to notify the court. 49 Va. L. Rev. at 1555. Here, for example, Maselli was unaware that his right to take an indigent appeal had been lost by Piccolo's inaction until it was too late to advise the trial court; thereafter his subsequent requests for permission to appeal and for the assistance of appellate counsel were denied by the state courts.

The State tells us that relieving defendants of responsibility for the sort of misconduct of their chosen counsel which transpired here will invariably "* * * put a premium on incompetent and inefficient counsel whose mistakes could be more certainly relied upon as effective aid for reversal than the sound and competent advice and trial conduct of the most efficient counsel". Popeko v. U.S., 294 F.2d 168, 171 (5 Cir. 1961). We do not share this belief. As we have already observed, relator does not suffer here from counsel's tactical or strategic errors, the detection of which would impose upon the courts the intolerable burden of inquiring into counsel's designs at every stage in the proceeding, see 49 Va. L. Rev. at 1554. And, while overzealous counsel might occasionally commit deliberate errors with the express or implied consent of his client, see, e.g., People v. DeSimone, 9 Ill.2d 522, 138 N.E.2d 556 (1956), such cases will be rare, 49 Va. L. Rev. at 1541, and should be treated on their own facts. Here, counsel's post-trial conduct contrary to his client's wishes is not attrib-

> utable to the accused, who was unconscionably prejudiced thereby. Fundamental fairness requires that he be granted the rights which were lost to him through no fault of his own.
>
> Moreover, to hold otherwise would result in invidious discrimination against indigent defendants. As "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has' ", Douglas v. State of California, 372 U.S. 353, 355, 83 S.Ct. 814, 816, 9 L.Ed.2d 811 (1963), quoting from Griffin v. People of State of Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed. 891 (1956), we must seek to "assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." Anders v. State of California, 386 U.S. 738, 745, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). Here, it is clear that the loss of Maselli's appellate rights, rights so useful to his codefendant Reid, was occasioned by his indigency as well as by his counsel's incompetency. Had he been financially able to employ private counsel on appeal Maselli would most assuredly have followed Piccolo's inadequate advice to seek an appellate specialist and might even have induced Piccolo to handle the appeal. This is precisely the situation in which the Supreme Court has suggested that the Fourteenth Amendment requires a State to grant relief. See Norvell v. State of Illinois, 373 U.S. 420, 422-423, 83 S.Ct. 1366, 10 L.Ed.2d 456 (1963).

Chief Judge Haynesworth in *Stevens v. Warden,* Maryland Penitentiary, Fourth Circuit, 382 F.2d 429, sympathized with the defendant as to the sentence he received and felt it was harsh and uncalled for under the facts of

the case, but felt the Federal Court was powerless to afford relief. The Eighth Amendment was not discussed. However, Judge Haynesworth did answer each of the defendant's allegations concerning his charge of incompetency of trial counsel.

Of course, it appears, at least on the surface, that some Circuit Courts require more of an attorney than others. Circuit Judge Rives in *Brooks v. Texas*, Fifth Circuit, 381 F.2d 619, stated that "This Circuit has been strict in its requirement of the effective assistance of counsel" (624). There, the attorney was held ineffective because he failed to make objections and failed to make adequate preparation, among other things.

Inadequate representation due to overwhelming amount of work in public defender's office. See *Lewis v. Henderson*, Sixth Circuit, 381 F.2d 523.

TENTH CIRCUIT: Mockery, sham or farce. *Johnson and Johnson v. U. S.*, Tenth Circuit, 380 F.2d 810.

An attorney who confessed that "He (the defendant) was a hard man to represent, he didn't recognize the importance of the facts in his own case, he couldn't follow counsel's advice . . ." "There were mean facts which I was never able to present to the jury because of circumstances beyond my control . . .", was held to be grossly inadequate in *Fortner v. Balkcom*, Fifth Circuit, 380 F.2d 816.

Merely because an attorney has a fatal heart attack shortly after the trial will not get any relief. *Rambo v. Peyton*, Fourth Circuit, 380 F.2d 363.

If a client commits perjury and then tells his attorney he committed perjury and the attorney, without author-

ization from the client, tells the court, and the client is not present when this conversation occurs, has the client been denied the effective assistance of counsel? It appears the answer is "Yes" by reading the opinion of *McKissick v. U. S.*, Fifth Circuit, 379 F.2d 754.

What happens if defense counsel has been misled by misstatements of the prosecution? In *U. S. v. Poole*, Seventh Circuit, 379 F.2d 645, the defendant obtained relief where it was shown that the complaining witness was supposed to have been examined by a certain doctor. Defense counsel tried to but did not locate this doctor. Apparently, this was the end of his investigation. After the jury verdict, defense counsel then learned that another doctor was the one who made the examination. Though the Court reversed on the basis of supervisory powers, it would appear that by the actions of the prosecution, the defendant was denied the effective assistance of counsel.

Circuit Judge Bell, in *Hintz v. Beto*, Fifth Circuit, 379 F.2d 937, writing for a unanimous Court, held that where the defense lawyer was given a psychiatric report the morning or day of the trial, although the result of same had been previously conveyed to the attorney, and the attorney moved for a continuance in order to examine and study the report, which was overruled, but no issue was made as to the defendant's mental condition during the trial, the defendant was denied the effective assistance of counsel.

The Court of Appeals for the District of Columbia in *Bruce v. U. S.*, 379 F.2d 113, Circuit Judge Leventhal writing the majority opinion and Judge Bazelon writing a dissenting opinion, denied relief to a defendant. However, some interesting things were brought forward:

Appellate counsel erects a structure of ineffective assistance of counsel resting on a foundation claim that appellant was given plainly erroneous advice by defense counsel, who considered that the crime of robbery had been established by appellant's presence when his companions decided to and did rob a store, and his sharing in the loot. Appellant's additional responses to the plea judge is explained substantially as follows—that it was because defendant was erroneously told by his counsel that he was guilty, that he answered "Yes" when the judge, after admonishing him to tell the truth and not to "dilly dally with this Court", asked him whether he knew before entering the High's store that a robbery was to take place there, and whether he had the intention of participating in that robbery. This background, argues counsel, shows that the guilty plea was not made "understandingly," i.e., understanding "the meaning of the charge, and what acts amount to being guilty of the charge," and that due to ineffective assistance of counsel appellant has never had his day in court.

We begin our analysis by putting aside for the time being the answers given by appellant at the plea proceeding. In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness. Although the cases are rare and extraordinary, it appears that an accused may obtain relief under 28 U.S.C. § 2255 if he shows both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.

It would not be fruitful to attempt further delineation of the applicable standard by reference to generalities,

except perhaps to say that a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for new trial either by the District Court or by this court on direct appeal.

Assuming for discussion that the requisite incompetence can be made out by showing an ignorance of critical doctrine discoverable with rudimentary preparation, we are not persuaded that this is such a case. The advice of defense counsel was not formulated, and cannot fairly now be supported, as a tactical estimate of a "high probability of conviction." But it is likewise plain that his advice that appellant's own statements showed him guilty was not based on the premise that he was guilty by virtue of mere presence and guilty knowledge, a premise that we have held unsound. The advice of defense counsel focused on the existence of a general plan to get some money by doing "mischief."

The fair import of counsel's testimony was, in short, that he understood it was agreed to rob someone, somewhere. That is how we take his questioned advice, particularly in view of appellant's failure, notwithstanding his burden, to define "mischief" further through either cross-examination of defense counsel or appellant's own testimony. Appellate counsel does not argue differently. His point is, apparently, that robbery requires the intent to take property from a particular victim, not merely a general intent to rob that remains unfocused.

Without saying whether or to what extent we agree with the decisions we now cite, we note that there is authority to support the proposition that when a person plans with others to rob someone, somewhere, his presence without protest at the scene of the crime undertaken by others is sufficient to constitute encouragement and sufficient participation for aiding

> and abetting. Again, without taking a position on the merits, we note that appellant's robbery guilt may be established under the rule that one who enters into a conspiracy to commit an offense is guilty of any substantive offense committed by his co-conspirators that is in furtherance of and a reasonably foreseeable consequence of the conspiracy.
>
> It may be that appellant would have fared better if his counsel had been more experienced, knowledgeable or aggressive, had sought to question or limit rather than apply the full measure of doctrines of vicarious liability. But certainly the doctrines cited refute the claim that the advice of defense counsel establishes that he lacked the minimum standards of competence necessary to satisfy appellant's constitutional right to counsel.

In *Greer v. Beto*, Fifth Circuit, 379 F.2d 923, the following is found:

> Under the facts before us, it is apparent that a sharp issue is presented as to whether appellant had the effective assistance of counsel, as was his due, at the trial in light of the undisputed fact that no medical evidence whatever, psychiatric or otherwise, was offered on the question of his sanity. His trial counsel testified by interrogatory that he did not know of any doctor who had examined appellant. His explanation, by a fair inference, was that appellant had only recently been found sane. This failure to offer testimony was compounded by the introduction into evidence of the jury verdict rendered in the sanity trial finding appellant sane. In addition the trial was before a different jury and the issue of insanity was being tried anew. We think that this, without more, makes out a prima facie case of ineffective or inadequate assistance of counsel.

Quarrels v. Dutton, Fifth Circuit, 379 F.2d 934, is an interesting case, to say the least, in that the defendant actually plead guilty to four indictments alleging a date at which time he was duly incarcerated by the officials of the State of Georgia. Circuit Judge Ainsworth pointed out that in the Court's original opinion, 354 F.2d 985, emphasis was placed on the adequacy of counsel. Still the Court held that, nevertheless, the lower Court was to determine what facts there were to show how the defendant plead guilty to a crime charged against him when he was incarcerated.

The fact that a client may feel he is more competent than the attorney in reference to the trial of a case is insufficient to sustain error. *Argo v. U. S.*, Ninth Circuit, 378 F.2d 301.

Circuit Judge Goldberg of the Fifth Circuit, in *Odom v. U. S.*, 377 F.2d 853, had the following to say regarding this very troublesome issue of ineffective assistance of counsel:

> A defendant is entitled to the effective assistance of counsel. Gideon v. Wainright, 1963, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Powell v. State of Alabama, 1932, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 159. We have found no Supreme Court decision basing a finding of deprivation of a fair and impartial trial on lack of effective appointed counsel, and lower courts have been somewhat less than explicit as to what does and does not constitute effective assistance. It is abundantly clear, however, that the guarantee does not underwrite errorless counsel, or successful counsel, or the best counsel available. It is equally true that errors of judgment and tactical errors on the part of any attorney do not constitute a denial of effective assistance. To be judged ineffective, counsel

must have been "* * * so incompetent as to deprive his client of a trial in any real sense" render the trial a mockery and a farce is one descriptive expression." Mitchell, supra, 259 F.2d at 793. Only if the attorney's conduct is "shocking to the conscience of the Court" can the charge of ineffective counsel prevail. Scott v. U. S., 6 Cir. 1964, 334 F.2d 72, cert. denied 379 U.S. 842, 84 S.Ct. 81, 13 L.Ed.2d 48.

Keeping in mind that Odom's allegations of ineffective assistance must be limited to matters ascertainable from the record, we turn to the facts of the case at bar. Appellant contends that his counsel was derelict in failing to object to questions put by the Court and propounded by the prosecutor and to arguments made by government counsel. At worst, these are tactical errors and are not misconduct amounting to ineffective representation. Counsel's omissions in this case are closely akin to those in Burton v. U. S., 1945, 80 U.S. App. D.C. 208, 151 F.2d 17, cert. denied 326 U.S. 789, 66 S.Ct. 473, 90 L.Ed. 479, where appellant alleged that his counsel in a murder trial was incompetent for failing to object to certain testimony and failing to rebut certain evidence. The court rejected these contentions on the ground that they constituted good trial strategy and added:

"But if this assumption were incorrect they would not be ground for reversal. There are few trials free from mistakes by counsel. After judgment and on appeal, errors in judgment as to the conduct of the defense are easy to point out. * * * Under such circumstances it is well settled that error in judgment, incompetency or mismanagement of the defense by counsel is generally not ground for a new trial." Id. at 18.

Moreover, trial counsel's effectiveness in the court below is established by our reversal of this case

> on a testimonial error to which counsel made timely objection. He who wars must sometimes win and sometimes lose. The Constitution, it must be remembered, commands a battle, but not a victory.

This is possibly the only case where trial counsel's effectiveness resulted in the defendant getting a new trial and at the same time being challenged as ineffective on appeal.

The Fourth Circuit in *Fields v. Peyton*, 375 F.2d 624, Circuit Judge Sobeloff writing the opinion, it was held that once a defendant made out a prima facie case of ineffective assistance of counsel, the burden of proving lack of prejudice shifts to the State. Thus, a late appointment and lack of preparation by counsel will make out a prima facie case of ineffective assistance of counsel.

It is not unusual for the Government or State to argue as in the case at Bar that because of counsel's excellent past reputation or because the defendant had stood before the bar of Justice at some time in the past, the defendant has not shown, regardless of the facts of the particular case, he had ineffective assistance of counsel. The Fourth Circuit has rejected the latter as "The right (to effective assistance of counsel) is not conditioned on the absence of a past criminal record." *Fields v. Peyton, Ibid.* The Eighth Circuit, in *Cardarella v. U. S.*, 375 F.2d 222, has also rejected the former contention, even though the attorneys were found to be competent and effective.

> True, the mere fact that persons on trial are represented by "four such distinguished lawyers" with "broad legal experience" (Judge Duncan's characterization) does not, of course, negative a charge that assistance of counsel in a specific case was ineffective

in the constitutional sense. However, no one reading the trial record in this case, as we have done, can fail to agree with the evident conclusion of Judge Duncan that the case was well tried for all defendants and with professional fidelity.

The rule applicable is that a charge of inadequate representation can prevail "only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court." O'Malley v. U. S., 6 Cir., 285 F.2d 733, 734 (1961). See also Mitchell v. U. S., 104 U.S. App. D.C. 57, 259 F.2d 787, 793 (1958), cert. den. 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86; Dayton v. U. S., 115 U.S. App. D.C. 341, 319 F.2d 742, 743 (1963), cert. den. 375 U.S. 947, 84 S.Ct. 357, 11 L.Ed.2d 277; Scott v. U. S., 6 Cir., 334 F.2d 72, 73 (1964), cert. den. 379 U.S. 917; and Frand v. U. S., 10 Cir., 301 F.2d 102, 103 (1962). In Frand, the principle was stated in this fashion:

"But the constitutional right to the effective assistance of counsel does not vest in the accused the right to the services of an attorney who meets any specified aptitude test in point of professional skill. * * * It is instances in which resulting from the substandard level of the services of the attorney the trial becomes a mockery and farcical that the judgment is open to collateral attack on the ground that the accused was deprived of his constitutional right to effective assistance of counsel."

May a defendant equate his attorney's intolerable rudeness with militant advocacy and obtain relief? Apparently not as seen in *Carter v. U. S.*, Ninth Circuit, 373 F.2d 911. From the opinion, it appears that a certain amount of hostility arose between the trial judge and trial counsel; sufficient to warrant a finding of contempt on the trial

attorney, which contempt was sustained on appeal. Thus, an accused, by *his* selection of counsel cannot take present advantage of unsuccessful tactics which could have been chosen with deliberate premeditation. What about court appointed counsel in the same situation?

In order to raise error for failure to call witnesses, it is incumbent on an accused that he name his witnesses and what they would have testified had they been called. See *Cowens v. Wainwright*, Fifth Circuit, 373 F.2d 34.

Concerning trial errors, Circuit Judge Smith of the Third Circuit said:

> It is well settled that errors committed during the trial of a criminal case in a state court are not subject to review in a habeas corpus proceeding in a federal court unless it is shown that the errors were so conspicuously prejudicial as to deprive the defendant of a fair trial. Jackson v. People of California, 336 F.2d 521, 524 (9th Cir. 1964); Pike v. Dickson, 323 F.2d 856, 860 (9th Cir. 1963), cert. den. 377 U.S. 908, 84 S.Ct. 1164, 12 L.Ed.2d 179; Harrison v. Boles, 307 F.2d 928, 931 (4th Cir. 1962). There was no such showing here. (U. S. of America ex rel James CANNON, Appellant v. James F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pa., No. 16201., 373 F.2d 908, (910)).

What is the status of an accused who claims he had ineffective assistance of counsel and there is presently no transcript available, no record on appeal and the trial attorney is deceased? By the Tenth Circuit in *Guerra v. Rodriguez*, 372 F.2d 472, he runs into a presumption that his trial attorney adequately protected his rights.

Ordinarily, when the district attorney makes full disclosure to either retained or court appointed counsel of

his file and this file is used to interview the defendant, even though this period of time may be relatively short, the defendant will usually obtain no relief on the grounds of ineffective assistance of counsel. See *Allen v. Rodriguez*, Tenth Circuit, 372 F.2d 116.

A defendant usually fares badly as to credibility where he does not attack the effectiveness of his trial attorney until a late date. The Tenth Circuit, at least, views the defendant's testimony with extreme caution when this occurs. See *Sobota v. Rodriguez*, Tenth Circuit, 371 F.2d 909.

A defendant who is, in part, contributorily negligent, if the Court please, as to obtaining counsel, will usually suffer for his own neglect. See *U. S. v. Barney*, Seventh Circuit, 371 F.2d 166.

Ordinarily, a defendant cannot impeach legal records. However, in *Holmes v. U. S.*, D.C. C.A., 370 F.2d 209, it was held the accused could impeach the records of the District of Columbia Court of General Sessions which showed a particular attorney was appointed for a preliminary hearing. However, the allegations were sufficient to raise the serious issue of whether the defendant was effectively denied a preliminary hearing and whether such denial was prejudicial.

As earlier mentioned, mere failure to make a particular objection is insufficient to gain relief. However, in *Stem v. Turner*, Fourth Circuit, 370 F.2d 895, it was held:

> But a failure by trial counsel to investigate, or vigorously to press, the illegality of the search under North Carolina law would be strong evidence of ineffectiveness of counsel unless waiver, measured by

federal standards . . . occurred as an element of trial strategy. (900).

What if trial counsel fails to object, when the objection would have been good, and the government subsequently puts on evidence which would have made the objection bad? He is not ineffective. In fact, his trial strategy may be deemed good. See *Weller v. U. S.*, Ninth Circuit, 369 F.2d 919.

The Fifth Circuit, as shown by *King v. Wainright*, 368 F.2d 57, has held that the defendant suffers for any mistakes retained counsel makes. There, the defendant did not receive direct appellate review because of a procedural error his retained counsel made. The Court held that this was not because of any action by the State. (59).

As previously mentioned, it is the totality of the circumstances of the case which will or will not render an attorney ineffective. In *Roberts v. Dutton*, Fifth Circuit, 368 F.2d 465, the attorneys who were court appointed were held ineffective. There, the Court took the cumulation theory and pointed out in the opinion the following:

1. Only one minor objection was made during the trial;
2. The trial lasted only approximately 1½ hours;
3. The charge was a capital offense;
4. The time spent in interviewing the defendant was relatively short and only one attorney did this;
5. The lack of thorough cross examination of one or more witnesses; and
6. The failure to assist the defendant in making a statement to the jury.

In other words, if the defendant had relied on just one item, he probably would not have received any relief.

Failure of the attorney to adduce proof of defendant's incompetency at time of trial when evidence was available will render the attorney ineffective. See *Owsley v. Peyton*, Fourth Circuit, 368 F.2d 1002.

In *Bell v. Alabama, Fifth Circuit*, 367 F.2d 243, Chief Judge Tuttle, writing for a unanimous court, in a case where a hearing was ordered on the defendant's allegations concerning ineffective assistance of counsel, said:

> Considering next the allegations that appellant did not receive the effective assistance of counsel, the applicable test is stated in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).
>
> It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Id. at 704. (Emphasis added.)
>
> It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant. Scott v. U. S., 334 F.2d 72 (6th Cir. 1964). Contentions strikingly similar to those made here were presented in Jones v. Cunningham, 297 F.2d 851 (4th Cir. 1962). A state prisoner alleged in his habeas corpus petition that his assigned counsel had entered the case only after he had entered a plea of guilty; that the plea had followed a coerced confession; and that counsel had advised

prisoner there was nothing he could do for him since he had already made a confession. In reversing the district court's dismissal of the petition, the court said:

"Especially striking is the petitioner's assertion that the court-appointed lawyer, after the most superficial contact with the case and without making inquiry into the circumstances, counselled surrender because the defendant had given a confession—a confession allegedly made under stress and coercion. No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea * * * or of the extra-judicial confession which induced the plea." Id. at 855. (Footnote omitted.)

An unusual case regarding trial counsel's actions is *Ingram v. Peyton*, Fourth Circuit, 367 F.2d 933. It was not shown whether trial counsel was court appointed or retained. After trial was concluded, through no fault of pre-trial investigation work done by trial counsel, it was learned by trial counsel that the complaining witness or chief witness had a prior conviction for perjury, but under a different name. This information was not conveyed to the defendant nor did trial counsel pursue the matter further and, in fact, it was not learned until 16 years later that this had occurred, together with the fact that a motion had been presented to the trial judge, which was denied. There was also a serious question of denial of appellate rights in this same case. The Fourth Circuit held that:

Looking to the substance of the matter, a prima facie case has been stated, whether treated as the petitioner contends, as a denial of the right of effective assistance of counsel, or as a deprivation of the right of appeal. (938).

A hearing has been granted where defendant's proofs showed he had been held incommunicado in several jails for four months following his arrest, received appointed counsel three days before trial, given a life sentence, no witnesses testified in his behalf at trial, no showing how confession of co-defendant was admissible, and no appeal was prosecuted from conviction. See *Mosley v. Dutton*, Fifth Circuit, 367 F.2d 913.

The Fourth Circuit in *Martin v. Virginia*, 365 F.2d 549, condemned and struck down Virginia's one-day indictment, designation of counsel, and trial rule. The Circuit Court adopted a statement of the District Judge, who said:

> "The Court recognizes that in each of these cases (dealing with effectiveness of court-appointed counsel's representation) the facts were different, but the principles are not different. The appellate courts have insisted that ample time be allowed counsel for preparation. They pointed to possible prejudice in some of the cases, but a showing of actual prejudice is not the basis on which these cases rest. The lack of opportunity for investigation, reflection, conference, and mature consideration which results from trials of felonies immediately after appointment of counsel provides the basis for granting the writ. * * * Courts need not look for specific prejudice. The burden isn't on the petitioner to show that he would profit by a trial in which counsel had more time for preparation. Lack of due process is implicit when a felon is tried immediately after the appointment of counsel. * * * To hold otherwise simply invites courts to continue the procedure that leads to pro forma representation. The State can show no compelling reason for indicting a felon, appointing counsel, and trying him all on the same day."

These and other cases, while differing in their particular facts, establish the principle that a lawyer's duty in representing a person charged with crime may not be discharged perfunctorily or mechanically. Representation is not adequate and a trial does not meet the standard of fundamental fairness if a court-appointed attorney fails to investigate and reflect upon his client's case.

The question is not one that can now be answered with any degree of certainty, nor need it be answered. The point is that because of the haste that marked the entire process this lawyer was simply in no position to evaluate his case and make considered judgments on these matters.

In *Braxton v. Peyton*, Fourth Circuit, 365 F.2d 563, another Virginia case, the lawyer was held not to be ineffective. However, Circuit Judge Sobeloff said:

Courts have a duty of vigilance to assure that appointed counsel shall give proper professional service to their indigent clients. Not only should the court make the appointment as promptly as possible, but the assigned lawyer should confer with the client without undue delay and as often as necessary, advise him of his rights, ascertain what defenses he may have, make appropriate investigations, and allow himself enough time for reflection and preparation for trial. Jones v. Cunningham, 313 F.2d 347 (4th Cir. 1963). Compare Turner v. State of Maryland, 303 F.2d 507 (4th Cir. 1962), with Turner v. State of Maryland, 318 F.2d 852 (4th Cir. 1963). In the second Turner case this court, condemning the conduct of court-appointed counsel, admonished that "[w]hether a lawyer is employed by a prosperous defendant at a handsome fee or serves an indigent without compensation in the discharge of the duty

> resting upon him as an officer of the court, the canons of our profession require his entire devotion to the interest of the client; warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.' American Bar Association, Canons of Professional Ethics, Canon 15." 318 F.2d at 854.

Even though trial counsel may have some second thoughts himself about effective representation and, in fact, confesses that he felt his former client did not receive adequate and effective representation, his testimony is accorded minimal weight in the Tenth Circuit. In *Aline v. U. S.*, 365 F.2d 278, Circuit Judge Lewis said:

> We place no particular significance upon trial counsel's present view and testimony that he would adopt a different trial technique were he to try the case again. Such view merely reflects the natural subjective expectation of an unsuccessful advocate that improvement can be made the second time around. It is well within the trial court's discretion to accord such testimony minimal weight in determining whether counsel has been constitutionally effective in his representation. (279).

Along the same lines; the Fourth Circuit in *Sykes v. Virginia*, 364 F.2d 314, said:

> Every lawyer on the losing side of a case probably feels that if he had had a little more time he might have done something else which would have been helpful. (316).

In order to raise the issue that a defendant had been denied the effective assistance of counsel because the defendant's trial counsel did not demand a complete

transcript of the initial trial, it is necessary that the defendant set forth specific facts that might be obtained from the transcript of the first trial. See *Blackburn v. Crouse*, Tenth Circuit, 364 F.2d 804. However, the interesting question remains that how can you set forth specific facts without having the transcript?

What is the effect on the issue of effective assistance of counsel where the defendant's wife files statutory rape charges against the defendant for the rape of a step-daughter of the defendant and then informs the defendant's aunt of the events and the aunt employs counsel? Both the aunt and the wife told the lawyer they wanted the case disposed of quickly, quietly and with as little notoriety as possible in order to protect the child involved. It was held in *Whitaker v. Maryland*, Fourth Circuit, 362 F.2d 838, that counsel was serving an interest or interests which conflicted with that of relator.

The Second Circuit in *United States v. Follette*, 358 F.2d 922, said that neither the Court nor the State is a surety for the proper performance of counsel, whether retained or assigned, and hence the State is not responsible if the attorney's duty with regard to advice as to the right of appeal is not performed.

Perhaps the Fifth Circuit, as stated in *Busby v. Holman*, 356 F.2d 75, best put the issue and Respondent's contention. Even though relief was denied. Cf. Judge Rives dissent.

> In considering this contention of the appellant we must bear in mind that the constitutional requirement of effective assistance of counsel does not require or permit the court upon a subsequent review

to analyze counsel's mental processes in order to determine whether every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued. United States ex rel. Boucher v. Reincke, 2 Cir. 1965, 341 F.2d 977, 981. It is not counsel who is on trial. There can be held to be a lack of the effective assistance of counsel only when it appears that counsel's assistance was so grossly inept as to shock the conscience of the court and make the proceedings a farce and a mockery of justice. Diggs v. Welch, 80 United States App. D.C. 5, 148 F.2d 667, 669. See, also Monroe v. Huff, 1944, 79 U.S. App. D.C. 246, 145 F.2d 249; Kinney v. United States, 10 Cir. 1949, 177 F.2d 895, and Rushing v. Wilkinson, 5 Cir. 1959, 272 F.2d 633, 638. Judge Minton well expressed the rule in United States ex rel. Kelley v. Ragen, 7 Cir. 1948, 166 F.2d 976, 980, as follows:

"* * * Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct might be considered on the proposition that such a trial was a denial of due process. The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce. * * *

> Petitions challenging the competency of counsel, especially years after the conviction, must clearly allege such a factual situation which if established by competent evidence would show the representation of counsel was such as to reduce the trial to a farce or a sham. Otherwise, they should be dismissed."

As Judge Seth said in *Williams* v. Cox, 10 Cir. 1965, 350 F.2d 847, 849:

> "* * * Although counsel conferred with appellant only briefly in the instant case, the record shows he was acquainted with him because of the previous appointment, and there is no indication that his representation of appellant in the case at bar was ineffective because of the brevity of consultation. No particular ritual is required in advising a criminal defendant of his fundamental rights. * * * Where, as in this case, the defendant appears in open court with his attorney who is competent to represent him and does so under circumstances fairly denoting that the attorney speaks for the defendant, who comprehends what is being done and its significance, and who acquiesces in counsel's statement that the defendant understands the charges brought against him and has been fully advised of his constitutional rights and enters a plea of guilty, such plea is valid."

In this case, during the hearing in the district court, the appellant sought to impeach his counsel's competency by showing that he was not a sober man. The appellant testified that he thought he smelled liquor on his counsel's breath. However, all the witnesses who testified on the subject stated that his counsel had a good reputation as a competent criminal lawyer, and the district court was fully justified in so finding.

Horne v. Peyton, Fourth Circuit, 356 F.2d 631, involved the interesting situation where the State of Virginia,

anticipating *Gideon*, supra, appointed a reputable attorney to represent several hundred previously convicted recidivists. In fact, on the day of the Defendant's trial, the attorney disposed of seventy-five other cases. The attorney, based on his investigation procedure, had a check-sheet to determine if the Defendant had counsel at his prior trial. It is not known from the opinion whether the defendant did or did not have counsel, other than counsel's investigation which did not encompass the checking of the records of the convictions. The Court held he was not ineffective as it was not shown that what he did not do did not show a harmful consequence to the defendant. Also, the defendant benefited immensely on the re-trial.

An attorney is not expected to predict what the future law will be. See *Stack v. Boyar*, Sixth Circuit, 354 F.2d 200. Attorneys who save "grateful" letters from clients usually save face at a later date. See *Stack, Ibid.*

Counsel at the habeas corpus hearing in *Hollis v. Beto*, Fifth Circuit, 352 F.2d 550, was held to be competent and adequate.

Merely because the trial attorney is found, subsequent to the trial, to have been physically and mentally and emotionally exhausted during the trial is insufficient to gain relief. See *U. S. v. Medlin*, Sixth Circuit, 353 F.2d 789.

The Second Circuit, in *U. S. v. Wilkins*, 351 F.2d 892, held that "Appellant is bound by the strategy which his counsel adopted. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), unless he was so inadequately represented as to make the trial a mockery of justice. *United States v. Garguilo*, 324 F. 795 (2d Cir., 1963)." (895).

The Sixth Circuit, in *Townsend v. Benner*, 351 F.2d 499, held that the due process clause of the Fourteenth Amendment requires the effective assistance of counsel in a criminal case. (501).

The Court's attention is directed to the excellent case of *Schaber v. Maxwell*, Sixth Circuit, 348 F.2d 664, wherein Circuit Judge Philips, writing the opinion for a unanimous Court, in a situation where the trial counsel failed to comply with Ohio procedural practice in entering a plea of not guilty by reason of insanity, said:

> This holding is not intended to be a reflection upon the character, integrity or professional reputation of either of the two court-appointed attorneys who represented petitioner in his criminal trial, both of whom are shown by the record to be reputable and experienced lawyers. We recognize that good lawyers can and do make mistakes; and in this case the mistake of counsel in a sense may have been induced by the failure of the trial court to indicate in any way that a written plea was necessary when counsel informed the court at the outset of the trial that petitioner was relying upon the defense that he was insane at the time of the commission of the crime.

The Ninth Circuit, in *Enriquez v. U. S.*, 338 F.2d 165, in a retained counsel situation, where the attorney who was critical of the lead trial counsel was also associate counsel during part of the trial, said that surmises that the attorney being critical of another attorney would not say that "they might have done better" is insufficient to warrant the Court in branding the defense as so inadequate as to amount to denial of the right to counsel."

In *Pineda v. Bailey and Beto*, Fifth Circuit, 340 F.2d 162, an attorney contacted the District Attorney's office in

El Paso and advised it that he would be available for court appointments. The office said they had a few persons who needed counsel. The attorney then went to the trial judge and told him he was representing the defendant. The attorney told the defendant that he had been appointed by the trial judge to represent him. The trial court learned of these circumstances prior to trial. At this time, the attorney was having his own personal problems with the Internal Revenue, the Grievance Committee and the newspapers. Although the District Court denied relief, the Fifth Circuit, speaking through Circuit Judge Hutcheson, held the lawyer to be ineffective.

Judge Rives of the Fifth Circuit, as noted above, holds an attorney to a high degree of professional care. In *Randazzo v. U. S.*, 339 F.2d 79, His Honor said that even if an accused has counsel of his own choosing, effective representation is lacking if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents are hobbled or fettered or restrained by commitments to others. (81).

In *Root v. Cunningham*, Fourth Circuit, 344 F.2d 1, Circuit Judge Christie said that "where an attorney gives his client his complete loyalty and serves his cause in good faith and to the best of his ability, the due process requirement for effective assistance of counsel is generally met." (3). "Ordinarily, one is deprived of effective assistance of counsel only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial." "This is especially true where, as here, the defendant chose and employed his own counsel." (3).

The Eighth Circuit, in *Hass v. U. S.*, 344 F.2d 56, held that "It well may be that a case of mail censorship could

result in deprivation of the effective assistance of counsel in derogation of the Sixth Amendment." "If, for example, the use of the mails constituted the only method whereby the defendant and his counsel could communicate with each other and such means of communication was censored, certainly the defendant then would have been deprived of his constitutional rights." However, in that case, the court did not so find. (67).

> The claim made in the appellant's brief that he was denied his constitutional right to competent counsel is without merit. He was not denied counsel; he selected his own counsel.
>
> Appellant's averment that he did not freely, voluntarily, understandingly, and intelligently enter his plea of guilty to this murder charge was based on the charge that he was subject to coercion and undue influence by one of his attorneys; that he was advised to enter a plea of guilty, or face, possibly, a sentence of death when, in truth and fact, the evidence would have shown that the man who was killed had attacked petitioner "twice before this alleged murder"; that the case, if properly presented, "would have resulted in a manslaughter conviction of murder in the second degree" that petitioner did not understand the nature of the charge against him or the consequence of his guilty plea; that petitioner's legal counsel were incompetent and did not protect his constitutional rights, and permitted the prosecution to deny petitioner his right to be confronted with his accusers.

With regard to the degrees of murder and the infliction of penalties therefor, we have recourse to the state law. Under the statutes of Tennessee, upon conviction of murder in the first degree, a jury is impanelled to hear the evidence and fix the terms of punishment, which shall be either the infliction

> of the death penalty, or imprisonment in the state penitentiary for life, or for some period over twenty years. Tennessee Code Annotated 39-2405.
>
> All kinds of murder, other than in the first degree, are, by the Tennessee Statute "deemed murder in the second degree." On a conviction for murder in the second degree, the penalty is imprisonment for not less than ten years nor more than twenty years. Tennessee Code Annotated 2408.
>
> The gist of appellant's complaint really is that he received a sentence of twenty-one years for first degree murder, instead of a possible, and probable, sentence of twenty years for second degree murder.

In *McCollum v. Bush*, Fifth Circuit, 344 F.2d 672, that Court held that a forty (40) minute psychological examination, during trial, at the noon recess, was State action and the State of Texas denied the defendant a fair trial and the effective assistance of counsel in adjudicating the defendant guilty and sentencing him to life imprisonment without any psychiatric testimony.

Thus, as the above cases reflect regarding the effective or adequate or competent trial counsel, there is a diversity of views as to what does or does not cumulate into either effective or ineffective representation.

As also previously noted, Federal Courts at the Circuit level have created certain metaphors:

> "farce," "mockery," "gross incompetence," "perfunctory," "substantial," "prejudicial," "bad faith," "sham," perfunctory, "pretense," "shocking to the conscience of the Court," "lack of opportunity for conference and preparation," "denial of fundamental fairness," "intergrity," "public reputation," "extreme circumstances."

It is respectfully submitted that regardless of whether counsel be retained, court appointed or even a volunteer he be held to the simple test, to-wit:

> Did trial counsel's representation of the accused from a totality of the circumstances of the particular case fall below minimum constitutional standards sufficiently to render either a lack of effective or adequate assistance, thereby depriving the accused of due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States?

With this simple standard, the facts of a particular case will control, not metaphors, which, without the facts of the particular case, are meaningless.

As to the issue of retained versus Court appointed counsel the distinction, if any, is truly a twentieth century novation. See Volume 65, Number 1, *United States Law Review*, January, 1931, pages 6-8, and Volume 24, *American Law Reporter, Annotated*, pp. 1025-1038.

The two (2) best discussions regarding this issue is seen in *Vavis v. Bamar*, supra, Sixth Circuit, 344 F.2d 84, and *Breedlove v. Beto*, Fifth Circuit, 404 F.2d 1019.

However, whether one uses the *Shelley v. Kramer*, supra, approach or some other approach the following is clear:

1. The accused can only be charged by the State or Government;
2. The accused can only be prosecuted by the State or Government;
3. The accused can only be convicted by agencies of the State or Government;

4. The accused can appeal his conviction only through the processes of the State or the Government;
5. The accused can only be represented at pre-trial, trial and post-trial proceedings by a licensed member of either the State or Government Bars. Cf. In re Ward, 28 Cal.2d 583, 170 P.2d 665 (1946).
6. The representative of the accused is certified by either the State or the Government to be competent and adequate.

Therefore, for an accused to be defended by an individual licensed by the State or Government; to be charged and prosecuted by either State or Government officials; and to be convicted by the agencies and processes of the State or Government and to say there is no State or Government action is reaching the incredible, to say the least.

Furthermore, what is so disastrous about granting a new trial where either retained or court appointed counsel are involved where counsel was incapacitated as a result of insanity, inebriation, illness or lack of professional capacity through want of legal training? See "Incompetent Counsel as Ground for New Trial in Criminal Cases." *Columbia Law Review*, 1947, Volume 47; pp. 115-122. Otherwise, "ignorance, blunders, and misapprehension of counsel" can become the rule of law.

By the facts of this cause, the following is clear:

1. Respondent had at trial a different attorney than the one whom his family retained;
2. The trial lasted a mere one hour and fifteen minutes;

3. The trial attorney neither interviewed nor attempted to interview favorable witnesses for the Respondent;
4. The trial attorney did not want the Respondent to plead not guilty;
5. The record and file of the trial attorney was absolutely bare of any pre-trial work;
6. The members of the Respondent's family were not told to be present at the trial because the trial attorney did not believe the trial judge would listen to any of them regarding mitigation;
7. There was no punishment hearing held after the Respondent was found guilty;
8. There was no pre-trial investigation by trial counsel;
9. There was no discussion of the law applicable to the case;
10. The rule was not invoked; thereby permitting the State's witnesses to remain in the courtroom during the trial;
11. No motion to suppress was filed;
12. Respondent's trial counsel asked of Respondent a highly damaging and prejudicial inadmissible question;
13. No motion for new trial was filed; and
14. Respondent was sentenced the same day he was found guilty.

It is, therefore, respectfully submitted, that the above is more than sufficient to render this representation below the minimum Constitutional requirements of effective assistance of counsel.

In summation, therefore, it is respectfully submitted that this Respondent did not have the effective and ad-

equate assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States and his conviction in the State court was, therefore obtained in violation of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

MARVIN O. TEAGUE
Attorney for Respondent,
Thaddeus King, Jr.
909 State National Building
412 Main
Houston, Texas 77002
CApitol 2-1728

CERTIFICATE OF SERVICE

I, Marvin O. Teague, Attorney for the Respondent, Thaddeus King, Jr., and a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the above and foregoing Response to Petitioner's Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to Petitioner's Attorney by depositing same in the United States Mail, postage prepaid, First Class, to Crawford C. Martin, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the _____ day of February, A.D. 1971.

MARVIN O. TEAGUE